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NOTICE

This book contains two sections. The first consists of two research papers prepared by the Family Law Project. These analyse the existing law in Québec and in the common law provinces. They include proposals for reform formulated by the Family Law Project.

The second section consists of a Working Paper of the Law Reform Commission of Canada. This includes the philosophy of the Commission and recommendations for changes in the law. The proposals in this section represent the views of the Commission.

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RESEARCH PAPERS

Foreword

Section 11 of the *Law Reform Commission Act* defines the mandate of the Commission in the following terms:

The objects of the Commission are to study and keep under review on a continuing and systematic basis the statutes and other laws comprising the laws of Canada with a view to making recommendations for their improvement, modernization and reform, including, without limiting the generality of the foregoing,

- (a) the removal of anachronisms and anomalies in the law;
- (b) the reflection in and by the law of the distinctive concepts and institutions of the common law and civil law legal systems in Canada, and the reconciliation of differences and discrepancies in the expression and application of the law arising out of differences in those concepts and institutions;
- (c) the elimination of obsolete laws; and
- (d) the development of new approaches to and new concepts of the law in keeping with and responsive to the changing needs of modern Canadian society and of individual members of that society.

The stated objective of removing anachronisms and anomalies from the law while reconciling the distinctive concepts of the civil and common law systems has presented some special problems in the search for appropriate reforms in the laws regulating the property rights and obligations of family members. Two quite distinct property systems have existed in Canada for many years. On the one hand, the common law jurisdictions have adhered to the doctrine of separation of property whereby each of the spouses maintains exclusive ownership and control over his or her own property. In Quebec, by way of contrast, the basic regime is one of deferred sharing and, on the breakdown or dissolution of the marriage, the property acquired by the spouses is treated as common property.

In view of the fact that the present property laws in Canada are regulated by provincial legislation, something should be said with respect to the involvement of the Law Reform Commission of Canada in analysing the existing property regimes and formulating proposals for reform. The federal interest in this area is premised upon several considerations. First, legislative jurisdiction over divorce is assigned to the Parliament of Canada by the Canadian Constitution. In exercising its legislative jurisdiction, Parliament has not only defined the circumstances in which a divorce can be granted but has also regulated the maintenance rights and obligations of divorcing spouses. It is obvious that questions relating to maintenance on divorce cannot be treated in isolation from issues relating to the disposition of property. Insofar as divorce necessarily involves regulation of the financial future of the spouses and their children, the laws must permit the divorce court to deal in a comprehensive and coherent manner with all aspects of the economic relationship, whether they relate to the distribution of present capital assets or the charging of future income by way of maintenance awards.

There may be certain constitutional limitations with respect to possible federal legislative involvement in this area of law. However, the need to promote uniformity, consistency, or at least compatibility between the various provincial regimes regulating family property rights cannot be ignored. Comprehensive resolution of the economic problems arising on divorce necessitates close federal and provincial cooperation in order that the rights of all Canadians may be ensured through the legal and judicial process. Provincial concern with the existing property regimes has been evidenced in studies undertaken or currently under way in British Columbia, Saskatchewan, Alberta, Ontario, Quebec, Newfoundland and the Northwest Territories but several provinces and territories have found it impossible to devote necessary resources and personnel to undertake the requisite research. The federal research that has been undertaken should assist in filling this vacuum and should constitute a foundation for securing federal and provincial cooperation in the implementation of necessary reforms.

In the final analysis, federal involvement in reform of the laws affecting the family, including family property laws, transcends questions of legislative jurisdiction under the Constitution. The injustices sustained under the present provincial regimes are problems that affect every married person in Canada. The Law Reform Commission of Canada has a public responsibility to inform Canadians of the present unsatisfactory state of the law and to formulate proposals for reform in order that the public as well as the legislators may respond with a view to providing a fair and equitable scheme for the distribution of property on divorce. The Parliament of Canada might conceivably introduce legislative provisions in the *Divorce Act* to regulate the distribution of property on divorce. But this is only one possible solution. The present priority is to identify the legal provisions that should be enacted to promote justice in the distribution of property rather than concentrate attention upon the agency, whether federal or provincial, that will implement acceptable pro-

posals. Once a conclusion has been reached respecting the appropriate changes to be made in the laws, the federal government and provincial legislatures must cooperate so as to enable necessary legislation to be passed.

The need for some fundamental reorganization of the existing property laws respecting the property laws regulating the rights and obligations of family members was underlined in the recent decision of the Supreme Court of Canada in *Murdoch v. Murdoch*. The public reaction to that decision clearly indicates that the existing laws discriminate to the prejudice of the married woman and are no longer acceptable in contemporary society. A property regime must be devised that will promote equality of the sexes before the law.

The study papers set out in this volume concentrate their attention upon the traditional monogamous marriage. It may be, however, that at some future time it will be necessary to consider a reform of the property laws in a broader spectrum and to have regard to other inter-personal relationships such as the commune, the de facto marriage, or the homosexual marriage.

This volume includes two major studies dealing with the law regulating the property rights and obligations of family members. The first constitutes a definitive study of the several regimes operating in the Province of Quebec. It is essentially analytical in content and purports to exhaustively survey the principles and the detailed laws operating under the various regimes in Quebec. The second study is, in contrast, only partially analytical in content. No attempt was made to exhaustively define the laws regulating property rights in each of the common law provinces. This would have been superfluous in view of the extensive research that was undertaken and published by the Ontario Law Reform Commission before the publication of its report on Family Property in 1974. Accordingly, the writers of the second paper concentrated their attention on summarizing the injustices and inequities arising under the doctrine of separation of property operating in the common law jurisdictions. Then, having regard to the research undertaken in provincial studies and in light of Professor Caparros's exhaustive review of the existing property regimes in Quebec, proposals for reform were formulated for the consideration of the Law Reform Commission of Canada. These proposals examine several possible alternatives to the existing property regimes in Canada. Reference is made to fixed property systems, such as deferred sharing, co-ownership of the matrimonial home, and community property, judicial discretion systems, and hybrid systems. Under each of these approaches, an attempt is made to explain the basic characteristics, to state fundamental principles, and to raise particular problems that need to be resolved.

After due consideration of the proposals submitted by the staff and consultants assigned to the Family Law Project, the Law Reform Commission prepared its own Working Paper on Family Property. A copy of this Working Paper is included in the final section of this volume.

The Working Paper, when read in conjunction with these background research studies, will no doubt lead the reader to conclude that there is no simple solution that can produce perfect results in all cases. But members of the public must inform themselves concerning the various alternatives in order that they may express their views to the legislators so that new laws can reflect contemporary public opinion.

Matrimonial Regimes in Québec

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Introduction

1. Before undertaking the study of matrimonial regimes some definition of concepts is necessary. Indeed, this study examines the effect of marriage upon the spouses' property as well as the effect of matrimonial regimes upon the capacity of the spouses. It also involves the classification of matrimonial regimes¹.

We find, however, that when we examine these issues and interrelationships, we reach conclusions which are different from what we have conceived the law as being². Therefore, we propose to study these notions within a theoretical framework.

A. Effect of marriage upon the property of the spouses

2. When persons marry and begin life as a couple, a whole series of needs arises³. These needs are not necessarily different from those which each spouse felt previously, but they arise in a different way. New needs arise when it is no longer simply the union of two people, but of several, that is, when the couple becomes a family.

Consequently, marriage inevitably affects the property of the spouses. This effect is acknowledged in different ways in positive law. Every matrimonial regime acknowledges this effect, at least with respect to the contribution to the needs of the family⁴, although, in certain cases, only the needs for survival are considered and, even then, in a restrictive manner⁵. On the other hand, other regimes go further and give to each spouse, in addition to essential needs, a right to participate in the patrimony [estate] which grew during married life⁶.

3. The idea of marriage affecting the property of the spouses is never totally rejected⁷. In certain cases, positive law acknowledges this only for the duration of marital life and for the essential needs of the marriage⁸. In such cases, it may be said that marriage has only a negligible effect with respect to matrimonial regimes. When this idea is rejected beyond the essential needs, the matrimonial regime establishes standards for the purpose of maintaining completely independent patrimonies between the spouses during the regime and at the time of its dissolution⁹.

It seems obvious to us that such an option, still valid in special cases, does not agree with the reality of married life¹⁰. It does not appear to be a suitable option for the entire population, especially since certain property will necessarily be merged in real life in spite of the legal standards established for the purpose of maintaining independent patrimonies¹¹.

4. In other cases, much greater importance is given to the effect of marriage upon property. In addition to the satisfaction of essential needs¹², both spouses are deemed as having contributed, in different ways, to the growth of the "family" patrimony and each has a right in the partition at the time of dissolution of the marriage¹³. This is the case of matrimonial regimes which acknowledge this effect of marriage upon property in a broader manner and which establish standards for the partition of property at the time of dissolution¹⁴. The impact of such standards may vary during the regime¹⁵. We think that this more complete acknowledgement of the effect of marriage upon property corresponds more closely to the reality of marriage and thus becomes, in our opinion, a preferable option with respect to a legislative choice for the entire population.

5. This concept of the effect of marriage upon property can therefore lead us either to regimes based on the independence of patrimonies or regimes based on the partition of property.

We are aware of our preference for regimes in which married women have historically remained incapable¹⁶. However, we should first define the relationship between matrimonial regimes and the capacity of the spouses.

B. Effect of matrimonial regimes upon the capacity of the spouses

6. In spite of the title of this paragraph which follows traditional concepts in this area¹⁷, we believe that matrimonial regimes do not affect the capacity of the spouses, but that the opposite is true in practice.

Although matrimonial regimes have distant beginnings¹⁸, they were preceded by concepts of the family and its internal structure.

The concepts of a single direction and authority within the family were originally the foundation of legal structures and societies based on the family¹⁹. Adding the concept of the weaker sex²⁰, the family structure became

one in which authority was entrusted to the husband²¹ and where the principle of the incapacity of married women was established²².

The legislature therefore establishes matrimonial regimes on the basis of such principles, *i.e.* authority of the husband and incapacity of the wife.

7. Consequently, it is not proper to say that matrimonial regimes are the cause of the incapacity of married women. They are the consequence. Considering the principle of incapacity of married women, the legislature enacted matrimonial regimes based on incapacity and thus brought about the wife's subordination to the husband²³. Since she is considered incapable, and since the husband has the authority, it is normal, in this context, that matrimonial regimes subordinate the wife to her husband.

Furthermore, irrespective of matrimonial regimes, married women are generally considered incapable with a few exceptions²⁴.

8. Matrimonial regimes do not in themselves govern the capacity or incapacity of women. Certain matrimonial regimes respect the capacity of each spouse²⁵; others, on the other hand, maintain the incapacity of married women²⁶. In both cases, these regimes are only the instruments of a previously established legislative policy. If the legislature considers that the capacity of the spouses must be respected, it establishes a matrimonial regime accordingly. If, on the other hand the legislative policy is aimed at maintaining the incapacity of married women, the matrimonial regime faithfully reflects this position.

Since matrimonial regimes depend on the principle of capacity or incapacity of married women, it is impossible to reverse the situation strictly by legislative policy. Thus, in Quebec, matrimonial regimes were dependent upon the principle of the incapacity of married women. When this principle was replaced in 1964 by that of the capacity of married women²⁷, the change in legislative policy did not fully reach its objectives²⁸. Matrimonial regimes are therefore the main cause of the incapacity of married women; however, it is due to a certain lack of legislative logic which did not realize that matrimonial regimes depended upon the principle of incapacity.

Indeed, when the *Civil Code* was promulgated in 1866, matrimonial regimes had been established in conformity with the principle of incapacity of married women²⁹. The codifiers then established techniques allowing the husband to exercise his authority by subordinating the wife to him³⁰. This principle of incapacity was therefore the cause and resulted in the techniques of matrimonial regimes.

Then, Quebec legislation evolved in this area and the cause (principle) was changed in 1964³¹; however, all the changes required with respect to the consequences (the techniques of matrimonial regimes) were not introduced³². As a result, we are faced with a somewhat contradictory situation. Indeed, when the principle of the legislative policy in this area is based on the incapacity of married women and when, as a result, the regime is based on incapacity by subordination techniques, the fact of changing the principle

alone does not confer full capacity upon married women. Not only should the principle be changed, but the consequences should be changed also.

Therefore, in this context, in order to effectively change a dominant principle of incapacity, the techniques of matrimonial regimes must also be changed³³.

9. The principles to be retained today and in the spirit of a future reform are no longer those which had guided the codifiers.

On the one hand, the concept of a weaker sex is generally dismissed as unrealistic³⁴. On the other hand, the concept of authority within the family must continue to evolve in order to adapt to the valid requirements of our society³⁵.

By abandoning or changing such concepts, the principles of capacity and balance between spouses and the matrimonial regimes conceived under the aegis of such principles, are established.

These regimes would abandon techniques of unilateral subordination and would establish a balance between the spouses relying upon techniques of coordination between spouses.

10. We have already set forth several criteria which could be used in establishing an absolute classification of matrimonial regimes, however, they were presented in relation to other concepts. These criteria should now be established systematically so as to provide a better understanding of the statements which follow.

C. Criteria of classification of matrimonial regimes

11. The traditional classification of matrimonial regimes included two main groups: the regimes of separation and those of community³⁶. A third group includes mixed regimes³⁷ which are sometimes grouped with the regimes of separation³⁸ and sometimes with the regimes of community³⁹. This classification which is too schematic although traditional, is not absolute since opinions on the classification of a given regime may differ. In our opinion, we should look for diverse and absolute criteria so as to avoid a classification which allows hybrid or mixed regimes or any kind of "chameleonic" regimes.

We believe that the non-absolute character of the traditional classification is due to the lack of particular criteria. Indeed, the classification of the regimes of separation and of community uses a general criterion which includes two or more criteria of classification. It is therefore impossible to obtain an absolute classification.

12. In our opinion, as we have already outlined in the first two paragraphs of the introduction, the two criteria used in defining matrimonial regimes relate, on the one hand, to the basic concept⁴⁰, and on the other hand, to the techniques adopted by the regime⁴¹.

The basic concept relates to the effect of marriage upon property, and the techniques relate to the consequences of the principle of capacity or incapacity of the spouses.

If the concept of the effect of marriage upon property is acknowledged only with respect to the needs for survival during marriage, it can be said that it is rejected with respect to matrimonial regimes. This rejection occurs in one group of matrimonial regimes, those based on independent patrimonies.

On the other hand, if the concept of the effect of marriage upon property is acknowledged beyond the needs for survival and goes as far as dissolution, it can be said that it applies to matrimonial regimes. This occurs in the other group of matrimonial regimes, those based on the partition of property between the spouses.

In both cases, the question is still not to know whether the consorts are in a balanced or unbalanced situation, but what the legislature's position is regarding the effect of marriage upon property. Its position allows us to determine whether or not there will be partition of certain property at the end of the regime. Therefore, this criteria determines two groups, or two types of matrimonial regimes, it does not determine the techniques.

13. The legislature, however, must not only establish the kind, it must also determine the specific types of matrimonial regimes.

In order to proceed further with our classification, we must determine the legislature's position with respect to the situation in which it wants to place the consorts.

If the legislature deems that both consorts are capable and must be in a balanced situation, it then seeks to establish coordination techniques according to which there can even be partial limitations on the capacity of the spouses. Such limitations, however, are identical for both spouses.

On the other hand, if the legislature deems that one of the spouses must be considered incapable and that they must be in an unbalanced situation, it then seeks to establish subordination techniques according to which one of the spouses may act without limitation whereas the other is subordinated to the former in his actions.

Here again, we are faced with the legislature's position but with a quite different question, that of the capacity of the spouses and the balance between them. The legislature either wishes to see the consorts in a balanced situation by adopting coordination techniques or in an unbalanced situation by adopting subordination techniques.

14. However, none of the isolated answers produce a matrimonial regime. Furthermore, the answer to the first question is independent from that of the second. The answer to the effect of marriage upon property could be negative, thereby establishing a regime based on independent patrimonies. The answer to incapacity could be affirmative, thereby submitting this regime of independent patrimonies to subordination techniques. However, the answers to both the first and second questions could have been affirmative.

In fact, each concept may relate indifferently to any of the techniques in the classification which then becomes absolute.

15. Our criteria of classification therefore relate, on the one hand, to the group of matrimonial regimes, and on the other hand, to the techniques of matrimonial regimes.

Consequently, there will be one group of matrimonial regimes based on independent patrimonies with two branches, according to the techniques, and a second group of matrimonial regimes based on the partition of property, again with two branches, according to the techniques.

This classification could be presented schematically as follows:

1. Regimes based on independent patrimonies:

- subordination techniques
- coordination techniques

2. Regimes based on the partition of property:

- subordination techniques
- coordination techniques

16. The following few examples should promote the understanding of this classification.

Among regimes based on independent patrimonies, we find the separation of property⁴², marital usufruct⁴³ (formerly known as exclusion of community⁴⁴) and the dotal regime⁴⁵. These three regimes exclude the effect of marriage upon the property of the consorts. All three belong to the same group. However, they differ with respect to techniques: the separation of property adopts coordination techniques⁴⁶, whereas marital usufruct⁴⁷ and the dotal regime⁴⁸ adopt subordination techniques since one of the spouses, the wife, is subordinated to the other during the regime.

We find a wider range of regimes among those based on the partition of property. There are the various communities, from the general community to the community of acquests⁴⁹ and all the regimes of participation in acquests⁵⁰. All these regimes involve a certain degree of partition at the end of the regime. As regards the techniques, we must refer to the positive law of each country. Only then do we clearly realize the independence of the techniques from the concepts.

The Dutch general community has adopted coordination techniques⁵¹, whereas the same general community in Quebec, as a conventional regime, has adopted subordination techniques⁵². Communities usually adopt subordination techniques⁵³. On the other hand, regimes of participation in acquests, including Quebec's partnership of acquests⁵⁴, usually adopt co-ordination techniques.

17. Therefore, in order to establish an absolute classification of matrimonial regimes, we must consider the basic concept which is usually made apparent at the time of the dissolution of the regime on the one hand, and on the other hand, the techniques of the regime. By establishing both as

coordinates, we are able to classify each regime while avoiding the risk of double-classification. We can be assured of an absolute classification when both elements are taken into account.

D. Plan of study

18. The theoretical framework which we have just established will enable us to examine Quebec legislation in this area. However, it is necessary, in a first part, to propose certain criteria which may guide the legislator in making fundamental decisions. We will study the regimes based on the partition of property under Quebec law in the second part, and the regimes based on independent patrimonies also under Quebec law in the third part.

PART ONE

Fundamental Options

19. Since we are preparing this study for a Law Reform Commission, it is important to formulate and attempt to answer the questions that such an organization should ask with respect to the study of matrimonial regimes. However, it is not necessary, in our opinion, to emphasize the fact that matrimonial regimes fall under provincial jurisdiction.

The preliminary questions, which we call fundamental options, first relate to what has been called the *primary regime*, a kind of substructure that would settle the everyday problems of married people and that would establish a balance between the spouses, considered individually as founding members, and the family, considered as a basic social unit.

The second question or second option relates to the *secondary regime*. We must determine what regime the legislature will impose on the spouses who have not chosen a regime and we must also determine the advisability of such an imposition.

Finally, we must examine the merits or lack of merits of the mutability of matrimonial regimes.

We will analyze these questions in the three chapters of this part in connection with present Quebec laws. This will enable us to study Quebec legislation and to make the criticisms or corrections we feel are desirable.

Chapter I

The Primary Regime

20. An unmistakable tendency towards the establishment of a primary matrimonial regime can be distinguished in the recent evolution of matrimonial regimes in comparative law⁵⁵. Indeed, legislatures are increasingly becoming aware of the fact that marriage affects both the lives of the spouses and their property. Only when the legislature becomes aware of actual interrelationships with respect to the minimum effect of the family upon the property of the spouse and when they adopt a series of provisions acknowledging this effect with respect to positive law, will we find what we call a primary regime in its judicial enactment.

The effect upon the property of the spouses obviously differs from one family to another but it seems possible to establish, in all cases, a relatively identical minimal effect, a common denominator. We are not seeking, of course, to impose uniformity on all married people but to discover common characteristics which can be regulated so as to facilitate the solution of everyday problems. It is a matter of discovering the reality of the family unit and its minimal needs. Such a discovery brings about the enactment of a series of legislative provisions which regulate daily family life while respecting interrelationships between the needs, the satisfaction of these needs and the rights of the consorts, the family and the creditors.

They usually consist of a minimum number of mandatory regulations to which all married people are automatically subject by virtue of their marriage. Thus conceived, the primary regime is a basic regime applicable to all families and constitutes the substructure of all matrimonial regimes⁵⁶.

The norms of such a regime can establish a balance between the interests of the family and those of its individual members. They can also insure the security of legal transactions and, especially, the protection of third parties⁵⁷. In addition to protecting the family by means of its minimal effect upon the

property of the spouses, this primary regime can settle a great number of everyday problems during marriage. Indeed, it usually settles problems raised by ordinary administration and daily needs which are often the only problems encountered during marriage. This primary regime can therefore determine the minimal economic conditions required for the development of families since it can promote economic relationships between the spouses, and between the spouses and their creditors.

21. Many countries have included primary regimes⁵⁸ in their legislation. Others, like Quebec, have not yet established a primary regime as such, although their legislation contains provisions regulating certain aspects of a possible primary regime⁵⁹. In addition, some consider these provisions to be sufficient⁶⁰.

22. This substructure of matrimonial regimes does not always take the same form, and the techniques used may vary; however, in all cases where a primary regime was adopted, we find identical fundamental principles (first section) and highly similar constitutive elements—which may adopt different techniques—(second section). We will examine these questions drawing from comparative law, especially from those countries which have adopted such regimes. We will also make the necessary correlations, analyses and criticisms in relation to Quebec law.

Section 1

Fundamental principles of the primary regime

23. The fundamental principles of the primary regime are few, but most important. There are two principles in our opinion: the mandatory character of the provisions of the regime and the acceptance by the legislature of the possibility of limiting the rights of the spouses in the interests of the family.

Metaphorically, they constitute the canvas on which the interrelationships between the constitutive elements of the primary regime interlace to form a tapestry. In spite of their small number, these two principles are therefore very important because they support all the legislative provisions of the primary regime. Indeed, these provisions would be ineffective were they not mandatory and were it possible for the spouses to avert them by agreement. However, they would not exist if, at the outset, the legislature had not accepted the possibility of limiting the rights of the spouses, when required, for then, the norms, which establish a balanced situation for the family as a unit in relation to its individual members, would have been mere wishes if included in the codes.

These two principles give the primary regime its consistency and strength. They allow us to state that the primary regime is the acknowledgement in positive law of the minimal effect of the family upon the property of the spouses. Such acknowledgement is made apparent by the establishment of a balance between the spouses, on the one hand, and the family on the other hand. Furthermore, as coordination techniques⁶¹ must be adopted in order to establish a balance between the spouses thereby limiting their rights, so does the balance between the spouses and the family require a limitation on the rights of the spouses.

We will study these two important principles in the following two paragraphs of this section. We will analyze the mandatory character of the primary regime in the first paragraph and we will examine the possibility of limiting the rights of the spouses in the interests of the family in the second paragraph.

Paragraph I

The mandatory character of the primary regime

24. The judicial enactments which have acknowledged the need to protect the family have included in their positive law a kind of charter or general regulations with regard to the family. They have thus included in positive law the minimal effect of the family upon the property of the spouses. However, in order for this charter to be effective, the legislature had to give a mandatory character to these norms⁶².

This mandatory character was explicitly enacted by the French legislature in 1965⁶³ whereas, in the other cases, it can be deduced from the context and the importance given to such provisions in the codes⁶⁴. We point out that a clear and formal acknowledgement of the mandatory character of the primary regime is most desirable but not an absolute necessity. Indeed, the primary regime can be just as mandatory when an article exists in the code to that effect as when no such article exists. There is no doubt as to the mandatory character of the Swedish, Dutch or German primary regime.

25. This procedure is not new. Indeed, before the adoption of primary regimes, the codes contained general and mandatory provisions regulating the effect of marriage upon the person and, at least partially, upon the property of the spouses⁶⁵. Legislatures have always been aware of the need to establish norms so as to establish a kind of marriage charter. The advantage of primary regimes is that they consider the family and its needs in a complete and explicit manner, whereas when no such regime exists, we can only find a few provisions relating mainly to interpersonal relationships between the consorts.

In Quebec, there is, of course, Chapter VI of Title V of the First Book of the Code which relates to "the respective rights and duties of husband and wife", but this regulation is still excessively individualistic. It cannot be considered as the primary regime because this regime requires a greater social dimension—it requires that the family be considered as a unit. Nevertheless, the norms contained in this chapter are not any less mandatory.

Consequently, when this mandatory character exists and when the legislature gives no explicit indication to the contrary, the spouses must submit to these norms. They may go beyond these provisions by means of a covenant by adding clauses that are more favourable than legal requirements; however, they may not, by such means, contradict or disregard any such mandatory provisions.

26. The primary regime reflects the legislature's intention to reconcile personal and family interests, and to establish a balance between the individuals and the family. However, in order to obtain such a balance, in addition to the mandatory character, the legislature must accept the possibility of limiting the rights of the individuals for the benefit of the group, when required only.

Paragraph II

The possibility of limiting the rights of the spouses

27. Like the mandatory character, this principle is also a fundamental one of primary regimes although it is revealed in quite a concrete manner. Indeed, faced with the need to establish a balance between the individual interests of the founding members of the family and the collective interests of the family unit, legislatures realized the necessity to sometimes make important changes in the exercise of the rights of individuals. Considering the effect of marriage upon the rights of individuals, they consist more of modifications than of limitations, strictly speaking, on the exercise of certain rights.

The limitations or changes in the exercise of individual rights are revealed in the analysis of the constitutive elements of the primary regime. It is nevertheless interesting to point out that, in 1965, French legislation included an article in its *Civil Code* providing for this limitation on the rights of spouses. Article 215 reads as follows: "Each consort has full legal capacity; however, his rights and powers may be limited by the matrimonial regime and the provisions contained in this chapter"⁶⁶. This article has surprised many authors⁶⁷. However, since most authors have already considered it normal that married women remain incapable on the grounds of family unity⁶⁸, they should also consider it logical and normal that the exercise

of the rights of both the husband and the wife could be limited in order to protect that very family.

28. Here again, this is not new. Before the creation of primary regimes, provisions already existed which either modified the exercise of certain rights of individuals or limited these rights. Indeed, although some married people persist in remaining single with regard to their property in spite of their marriage, they do not succeed in all respects. For example, when the wife was considered incapable the husband was bound to provide for her needs⁶⁹. Furthermore, by virtue of the household mandate, now legal⁷⁰, the wife can bind the property of her husband. It is obvious that such provisions prevented the husband from acting as a bachelor. The exercise of his rights with respect to his property was limited by his marriage and the obligations arising therefrom. It is also true that we have maintained these provisions in our code in spite of the present legal capacity of married women. This may be due to the fact that such limitations are not exclusively connected with the incapacity of women. If this were the case, we would have evidence of imbalance within Quebec law.

Indeed, articles 176 and 180 C.C. could limit the exercise of the husband's rights whereas the only limitations contained in the Code regarding the wife's rights are those derived from the techniques of the matrimonial regime chosen⁷¹, limitations which also apply to the husband.

As regards "the respective rights and duties of husband and wife" under Quebec law, it seems that an unbalanced situation exists with respect to acknowledging limitations on the rights of the spouses as a result of the effect of marriage upon property. We are even of the opinion that the limitations imposed on the husband by articles 176 and 180 are left-overs from a judicial context based on the incapacity of married women more than true limitations due to the effect of marriage upon the husband's property. Consequently, the only limitations imposed on both spouses by article 177 being limitations due to the techniques of matrimonial regimes, we can say that Quebec law has not yet recognized the need to limit, in certain cases, the rights of individuals for the benefit of the family unit.

29. We can readily understand that the balance between the spouses themselves and the family cannot be established without the acceptance of the principle of the possibility of limiting the exercise of the rights of the consorts. Indeed, legislatures have simply accepted and ratified in positive law, in whole or in part, the effect of marriage upon the personal and patrimonial rights of the spouses. As regards personal rights, the effect of marriage has almost always been recognized (for example, the obligations of fidelity⁷² and cohabitation⁷³). However, as regards the effect of marriage upon the property of the spouses, in spite of certain aspects sanctioned by law (for example, the husband's main obligation to contribute to the needs of the family, imposed by the legal mandate⁷⁴), it was not taken completely into consideration in a general manner. This effect upon the property of the

spouses is still not considered under Quebec law. Where they exist, the primary regimes have acknowledged and ratified this minimal effect of the family upon the property of the spouses through their constitutive elements.

Section 2

Constitutive elements of the primary regime

30. We have just studied the fundamental principles of the primary regime. However, they would be ineffective without the constitutive elements of these regimes. In order to generally determine these constitutive elements, we must first make a synthesis of the various primary regimes which exist in positive law. However, some primary regimes may not include all the elements or may not include them completely. It is nevertheless possible to state that the French and Dutch primary regimes may be used as models in this area, in spite of their differences.

We can thus group these constitutive elements under three headings: contribution to the needs of the family, protection of the family residence and legal protection of family interests. We will synthetically analyse these three elements in comparative law⁷⁵ in the three paragraphs of this section, while making the necessary comparisons with Quebec law.

Paragraph I

Contribution to the needs of the family

31. The codes have always contained provisions respecting contribution to the needs of the family or, according to their terminology, to the expenses of marriage. This element takes on a new aspect in primary regimes due to its interrelationships. When the legislature decided to protect the family and thus consider these interrelationships, they adopted provisions by which it became apparent that it was impossible to consider only a single aspect of the contribution to the needs of the family.

We do not consider it necessary to emphasize the fact that new needs arise from marriage and that such needs must be satisfied. This realization was the starting point of legislatures who included primary regimes in their positive law. We must however point out that the contribution of the spouses to the satisfaction of the needs of the family can be considered from two points of view: on the one hand, there is the mutual obligation to contribute,

and on the other hand, the mutual liability for debts contracted for the purpose of satisfying these needs.

A. The mutual obligation to contribute to the needs of the family

32. When the spouses are in a balanced situation, the principle of mutual contribution applies; usually, they must contribute in proportion to their respective means⁷⁶. However, the modalities of such contribution may vary due to the fact that such contribution may also be made in kind⁷⁷. This possibility of contributing in kind is also recognized, at least in general, by English law⁷⁸. Furthermore, it is also claimed for married women by international organizations⁷⁹.

We can consider it a general phenomenon. When, during the evolution of reforms in matrimonial regimes, legislatures overcame the obstacle of the incapacity of married women and when laws were passed to recognize full legal capacity for married women, the responsibility of contributing to the expenses of marriage in proportion to their means was placed on both spouses according to the texts regulating their rights and duties⁸⁰. This general principle of mutual contribution, established with respect to the rights and duties of the spouses, is sometimes repeated in special texts included within the regulations of the various matrimonial regimes, notably the conventional regimes of separation of property⁸¹. However, according to recent reforms, and especially in the judicial enactments intended to establish a true balance between the spouses, the principle of mutual contribution of the spouses is not restricted to financial contributions. Taking into consideration the different but equally important roles played by the spouses within the family, the legislatures who sincerely intended to reform this aspect of matrimonial regimes in an atmosphere of balance between the spouses themselves and the family, provided for methods of contribution in kind⁸². They thus recognized the economic value of the spouses' work and especially the silent, difficult and various types of work carried out by married women in the home.

33. On the other hand, Quebec law makes an exception in this respect. Even following the latest reforms, the principle of mutual contribution is not stated explicitly in the chapter on the rights and duties of the spouses. Indeed, the only provision respecting the contribution to needs is written in very individualistic terms and relates only to the husband's obligation to supply his wife with all the necessities of life according to his means and condition⁸³. There is thus, no indication of mutual contribution by spouses in this chapter, and there are even indications to the contrary⁸⁴. There are even fewer indications of acknowledgement of contributions in kind in spite of the representations made to the Civil Code Revision Office in this regard⁸⁵.

However, it is true that the principle of mutual contribution by spouses is established in the regulations of certain regimes⁸⁶ but, in studying these regimes, problems of interpretation arise.

34. We are able to ascertain that the judicial enactments that adopted primary regimes have, by the obligation to contribute to the needs of the family, effectively limited the rights of the spouses or, at least, their exercise for the benefit of the rights of the family. Indeed, in such regimes, the obligation to contribute to the needs of the family falls on both spouses, and both feel, with respect to their property or activities, the very direct effect and priority of the interests of the family over their individual interests. This priority is more evident when positive law forbids the spouses to dispose of their earnings and income before attending to family needs⁸⁷ or when it prescribes them to use their personal fortune to satisfy such needs⁸⁸. It is also manifest in the other cases.

However, determining the principle of mutual obligation to contribute to family needs is but one aspect of the question. Because of the close inter-relationships in this area, liability for the debts contracted for the purpose of satisfying such needs must also be provided for.

B. Joint and several liability for debts contracted with respect to family needs

35. It is easy to understand that, in order to establish a true balance between the spouses, joint and several liability for debts contracted for household needs must be recognized⁸⁹. There are needs to satisfy in every family, and the principle of mutual contribution to these needs by the spouses is becoming a general rule in all recent reforms. Since these needs must be satisfied and since both spouses must contribute—in spite of the various methods of contribution—it is logical to give each spouse the right to contract debts for the purpose of satisfying such needs. Along the same lines, in order to protect the family, it is logical to provide for the joint and several liability of spouses in this area: joint and several liability usually increases the family's credit. Of course, modalities and limitations must be established; as a matter of fact, many have already been established⁹⁰.

According to these judicial enactments, there is joint and several liability when the debts were contracted strictly for the needs of the family. For this reason, it is usually excluded when the expenses are excessive⁹¹, or when the person contracting with the spouse was in a position to understand that the purchases in question were unnecessary⁹², or in the case of hire-purchases⁹³, unless the other spouse has given consent to the act.

36. In order to establish a balance between the spouses, these legislatures have considered various notions, from the household mandate, known as *Schlüsselgewalt* under German law and similar to the notion of *agency of necessity* under English law, to joint and several liability. Indeed, the concept

of the mandate can be understood in the context of the incapacity of married women; incapable, they may not enter into contracts but since, in fact, they make many purchases and mostly those which satisfy the current needs of the household, such acts had to be recognized as valid while generally binding the husbands for debts so contracted⁹⁴.

However, we must point out that the German Federal Republic has not yet recognized joint and several liability, in spite of their primary regime which is quite perfect in other respects. Surprising as it may be, the *B.G.B.* has maintained the *Schlüsselgewalt*, or power of keys, for the benefit of married women only⁹⁵. Let us explain that the *B.G.B.* holds the husband liable for debts contracted for the needs of the household since, according to that code, the wife must, in principle, make her contribution by her work in the home⁹⁶. However, with respect to joint and several liability, German law is an exception among the legal systems which desired to establish a balance between spouses.

37. On the other hand, it is less surprising that Quebec laws have maintained the household mandate which became legal in 1964⁹⁷. Indeed, the Quebec legislature did not deem it advisable to establish a primary regime at the time of the last reform. They also did not deem it advisable to establish a general principle of mutual contribution by the spouses although it had done so with respect to certain regimes. Consequently, by making no fundamental changes in the chapter on the rights and duties of husband and wife, it thus maintained article 180 which had been included in the Code in 1964 and which simply confirmed a strong jurisprudence established during the last third of the nineteenth century⁹⁸.

However, it seems untimely to study the questions raised in Quebec law with respect to liability for debts contracted in the interest of the household. Indeed, regarding the contribution to such needs, the Quebec legislature chose to provide for these matters within the regulations of each matrimonial regime. It is therefore by studying each regime that we must consider the effect of the legal mandate as it exists in present law.

38. Therefore, with respect to the first constitutive element of the primary regime, i.e. the contribution to family needs, we have seen that all the legislatures who adopted a primary regime have established the mutual contribution to such needs by the spouses while recognizing the possibility of contributing in different ways. In addition to establishing this obligation, they also recognized—except for the German legislature—joint and several liability for debts contracted for the purpose of satisfying these needs. The two aspects of this constitutive element are so closely related that it is impossible to regulate one without regulating the other.

In both cases, at least, the exercise of the rights of individuals is limited, thus emphasizing the priority of family needs over their individual needs. The legislatures acted accordingly in order to protect the family and we find this generalized tendency throughout comparative law.

The Quebec legislature, however, has not yet reached the level of the legislatures of other countries in this respect.

However, in order to effectively protect the family, it is not sufficient to establish mutual contribution and joint and several liability. One of the most important needs of a family is lodging and legislatures tend to protect it.

Paragraph II

Protection of the family residence

39. While contribution to the needs of the family has traditionally and rightly been considered to be the essential element of matrimonial regimes, protection of the family residence is, in our opinion, another equally essential element of matrimonial regimes and especially of primary matrimonial regimes. It is even normal to consider lodging as part of the needs to which husband and wife must contribute⁹⁹. Positive law has not always specified the fact that the dwelling had to be protected even if doing so would have entailed minimizing the right of the spouse who is the owner of such dwelling. Yet, lodging is one of the first requirements of marriage.

The residence must first be chosen before it can be protected. It is therefore normal that the first provisions contained in this element relate to the choice of a residence still bearing in mind the family interests and the possible limitation on the powers of the spouses in this area.

Once the choice is made, provisions relate to the protection of the right by which it is assured. This protection takes the form of a preference given to the common property of the group over that of the holder of the right by which the residence is assured, which can even involve the relationships of such holder with third parties by way of immunity from attachment, which is usually the case. Such protection, however, may have an opposite effect. The residence declared unattachable with respect to the debts contracted by a family member may be held as security by family creditors so as not to diminish the family credit and thus make arrangements regarding the satisfaction of its needs. The entanglement of such provisions is readily apparent.

Furthermore, protection is not usually limited to the four walls and the roof, it also includes the household furniture. It also entails an entanglement of interrelationships similar to those of the right of ownership or co-lesseeship involving techniques which are different, of course, due to the very nature of the property to be protected.

40. In comparative law, protection of the family usually began in part by the protection of the residence. At the beginning, however, the reasons for such protection were not of a family nature.

Indeed, the American *homesteads*, with respect to which the first statute dates back to 1839¹⁰⁰, were primarily intended for the colonization of the

American West¹⁰¹. This institution spread in Canada for the same purpose, at least originally¹⁰².

Drawing most of their inspiration from these American *homesteads*, other countries also included statutes protecting the family residence in their legislation¹⁰³. In these cases, however, it can be said that such statutes were adopted more for socio-economic reasons (demography and colonization) than for the protection of the family¹⁰⁴. It seems, however, that such statutes did not receive wide application in three countries¹⁰⁵.

Notably, faced with an almost useless law respecting family property, the French legislature approved other laws intended to solve problems that were not necessarily of a family nature¹⁰⁶. Such provisions settled partial situations in specific contexts and, with the 1965 amendment to article 215 of the Civil Code, they have led to a complicated imbroglio¹⁰⁷ which is surely not in the interest of the family.

Recently, the English legislature has also partially protected the family by protecting the residence¹⁰⁸.

These partial measures for the protection of the family have not yielded the results expected by legislators. The major drawback to the partial protection of the family by protecting the residence is that, in addition to its relative effectiveness, it involves the inclusion of family-oriented measures in an often excessively individualistic context which, because of this context, are prejudicial to the family's credit as well as its growth.

Indeed, only when such measures are included in the provisions of a primary regime do they effectively protect the family¹⁰⁹ and, even then, other previous legislative provisions must not unbalance such protection, as it appears to have happened in France¹¹⁰.

41. There are no general provisions respecting the protection of the family residence under Quebec positive law. The only article relating to this element of the primary regime is found in the chapter on the rights and duties of husband and wife and only regulates the choice of the family residence¹¹¹. However, it was conceived and worded in a way that does not promote balance between spouses.

Nevertheless, certain matrimonial regimes may provide for the protection of the family residence, but the Quebec legislature has not yet adopted general provisions applicable to all married people.

We should, however, point out certain particular aspects of Quebec law in this regard. The household furniture is protected under the regime of community of property, whether it forms part of the common property¹¹² or the reserved property¹¹³. Indeed, the Code requires the concurrence of both spouses to dispose of such property. Theoretically, a house used as the family residence may also be protected, however, only if it forms part of the common property¹¹⁴ or the reserved property¹¹⁵. Furthermore, with respect to the partnership of acquests, article 1267c may allow the survivor to keep, under certain conditions, the dwelling house and household furniture. However, these provisions have a limited scope mostly because of the conditions required for their application.

We must point out that the Civil Code Revision Office has determinedly undertaken to protect the family residence¹¹⁶, although the draft published in 1971 was not well received¹¹⁷. The ideas set forth in this draft are generally valid but they usually fail to protect the family when they are limited to a single element of protection¹¹⁸.

42. As regards this constitutive element of primary regimes, legislators have realized the great importance of the dwelling with respect to the daily life and growth of the family. They considered that it is preferable to limit the rights of one family member—for example, the one who holds the right assuring the residence—than to risk depriving the family of shelter by the anti-familial actions of one founding member. Therefore, legislators have even forbidden¹¹⁹ or proposed to forbid¹²⁰ the owner from freely disposing of his property when he has already put it at the disposal of his family.

These provisions clearly show the priority of common family property over the individual property of the family members, even when it affects the owner of the property. It is important to remember the need to thus protect the family residence. On the other hand, many technical modalities provide such protection and the question is to determine which ones best correspond to the sociological context of the legislation.

43. Before examining the legal protection of family interests, we would like to emphasize the interrelationships between the constitutive elements we have just studied. It is a matter, really, of bridging contribution to the needs of the family with the protection of the residence. If, as we have said, contribution is closely related to joint and several liability for debts contracted for the needs of the family, in what way does protection for the residence and household furniture relate to the first element? While providing extensive protection for the family by increasing its credit, the first element, in our opinion, seems to be based on the needs of the family as well as on the protection of third parties who may provide the goods required for the satisfaction of such needs. On the other hand, protection of the residence seems to protect the family against the blundering or dishonest actions of one of its founding members.

In our opinion, in order for this protection of the residence and household furniture not to contradict or even destroy the credit which joint and several liability could have given to the family, this property (dwelling and household furniture), which is protected against the actions of one of the spouses, must also serve to increase the family's credit. In short, we believe that the family's credit may be prejudiced if the protection of the residence and household furniture is carried to its extreme by making this property unattachable, for it is usually the family's only property. On the other hand, immunity from attachment should also apply to the personal debts of each spouse even if the residence and household furniture should be considered as common security for the family creditors.

Comparative positive law also contains the other constitutive element of primary regimes: the legal protection of family interests.

Paragraph III

Legal protection of the interests of the family

44. As a rule, court intervention in so-called “family affairs” is not desirable. At least, it is undesirable if too frequent or if it is in regard to matters which, because of their nature and importance, require a decision by the spouses.

We are convinced that a family having three heads (the husband, the wife and the judge) is incompatible with our concept of family protection. It seems to us that court intervention must be limited except, of course, in serious cases such as separation from bed and board, divorce, and annulment of marriage. Indeed, in modern reforms, legislators have defined to a certain extent the responsibilities of the spouses towards the family. In many cases, the responsibilities allocated to the spouses vary according to restrictive clauses, whereas in other cases, each spouse is responsible for specific sectors of family activity. However, in all cases, court intervention must be limited to giving full effect to these responsibilities. As we accept this kind of court intervention which would force the spouses to assume the responsibilities given to them by law, we cannot accept court intervention as a substitute for the spouses’ power to make decisions.

However, in comparative law, this constitutive element of primary regimes establishes numerous judicial interventions in the interest of the family. On the one hand, the judge must intervene to give full effect to the allocation of responsibilities between the spouses, and on the other hand, he may intervene to modify this allocation.

45. Many countries have provisions within primary regimes which permit court intervention in order to assure that the spouses carry out their responsibilities in the interests of the family. One spouse may thus ask the court to force the other to contribute to the needs of the family¹²¹ or to suspend joint and several liability¹²²; judgments in such cases may be temporary and may be changed if need be¹²³.

With respect to the protection of the family residence, in the case where the spouse, who holds the title to the dwelling, breaks the rule requiring concurrence and alone enters into an act for which concurrence is required, the other may, under certain conditions and within the prescribed time, ask for the annulment of the act¹²⁴.

There are no such rules under Quebec positive law although, with respect to the contribution to needs, the spouses may call upon the courts, under certain regimes, when they do not agree on their contributory share¹²⁵. In principle, the judge settles the dispute as to the contributory share only; it does not seem that a spouse may call upon the courts to force the other to pay his contributory share in cases other than those of disagreement as to the proportion of such share.

It is normal that the *Civil Code* does not contain any provisions for court intervention with respect to the family residence since the primary regimes contain no provisions protecting the residence. However, article 183 has a general application and one spouse may ask for the annulment of an act disposing of the family residence or household furniture if, according to the rules of the matrimonial regime in question, the other spouse has exceeded his powers. Protection may therefore exist, although indirectly.

It is not difficult, however, to include these techniques in our law. They merely have to be extended more firmly to the protection of the family. Thus, the Civil Code Revision Office included, in its draft for the protection of the family residence, provisions permitting court intervention in certain cases¹²⁶.

The measures which permit court intervention to force one spouse to assume his responsibilities seem to us quite advisable; they indicate the law's intention to protect the family by special means in pathological cases. In certain cases, however, a spouse should not be forced to assume his responsibilities, while the other should be allowed to act without him.

46. Furthermore, the division of responsibilities made by the legislators requires certain provisions so as to avoid the paralysis of family affairs by the assignment of competence with respect to certain legal transactions. Thus, if the legislature considers that, in the interest of the family both spouses must concur or give consent to enter into particular acts, it must also provide for technical means allowing one spouse to act alone. Furthermore, when competence has been exclusively attributed to one spouse by positive law, it is also normal that technical means be provided to permit the transfer of such competence, in the interest of the family, when required.

Certain legislatures have provided for judicial intervention in both these cases. However, the techniques differ from one to the other. In the case of joint competence, a spouse usually requests judicial authorization when the other is unable to give his consent or refuses to do so and when such refusal is unjustified in the family interest¹²⁷. This technique exists under Quebec law¹²⁸.

In the case of inclusive competence, when the competent spouse is unable to act, the other spouse is generally granted legal capacity¹²⁹. However, Swedish law, in such cases, does not call upon the courts preferring to award legal capacity to one consort when the other is unable to give consent or to administer his affairs¹³⁰.

Quebec law does not yet contain provisions which permit the granting of general legal capacity to one spouse in the interest of the family.

47. Although the legislatures have established a distribution of powers between the spouses and granted exclusive competence to one spouse, in certain cases, as well as established provisions for avoiding the paralysis of family affairs, they have also considered that it was necessary to allow court intervention, in the interest of the family, to either limit the exercise of certain rights to one spouse, or change a decision made by the spouse who had the exclusive competence to make decisions. In both cases, the judge

must consider the actions of the spouse in relation to the interests of the family. The French¹³¹ and Swedish¹³² codes contain provisions which can further restrict, although usually for a limited period of time, the exercise of the rights of one of the spouses when he acts within his competence but against the interest of the family by virtue of which the legislature had granted him such powers.

We point out, however, that the French legislature has granted very wide powers to the courts so as to permit them to prescribe urgent measures to protect the interests of the family. Although such powers are extensive with respect to the measures the courts can prescribe, they are limited, however, by their duration and mainly by the conditions required by law for their adoption¹³³. We consider that court intervention to limit the rights of a spouse or the exercise of such right is fully justified when done in the interest of the family and more so when the spouse's behaviour jeopardizes the interests of the family (as required under French law).

Certain legislatures have also deemed it advisable to provide for court intervention to change a decision made by one of the spouses when such decision runs counter to the interests of the family.

However, we have found only two provisions, within primary regimes, which permit the courts to change a decision, and the nature of such intervention differs from one case to the other. Whereas the judge may intervene to change a decision made by the husband alone with respect to the wife's and children's residence under French law¹³⁴, we have found that Dutch law provides that the court may intervene to change, at the spouses' request, their contributory share to the needs of the family¹³⁵.

On the other hand, we have not found any provisions under Quebec law which permit court intervention for the purpose of limiting the exercise of certain rights or of changing a decision; such intervention could only be justified in the interest of the family.

This third constitutive element¹³⁶ of primary regimes is undoubtedly subordinate to the first two. Indeed, court intervention for the purpose of protecting the family depends on the protective measures adopted by the legislature with respect to contribution to the needs of the family and protection of the residence. This third element must also adapt to the tried and proven procedural techniques of various judicial systems.

Conclusion of Chapter

48. With the aid of comparative law, we have outlined in this chapter the fundamental principles and constitutive elements of primary regimes. The legislatures which have adopted such regimes have attempted through various techniques, to establish a balance between the spouses considered

individually and the family considered as social unit. This balance is usually revealed by the measures adopted for the protection of the family. We are unable to make a detailed criticism of each of these measures within the framework of this study. Our purpose was to point out the existence of such provisions in comparative law and to emphasize the extent to which they were incomplete under Quebec law. We are aware that the Civil Code Revision Office is studying this question and that the idea of proposing a complete primary regime seems to be accepted favourably within the Office. This idea remains to be applied and expressed in a complete draft to be submitted for approval to the legislator. We are also aware that the Revision Office has been criticized in this respect on the ground that its drafts are too *avant-garde*. Our opinion is, however, that such criticism is unjustified. We have become accustomed to the fact that law lags behind the times, and it is perhaps time to reverse the situation. The law could then instigate social changes instead of merely following these changes.

The Quebec legislature has already taken a big step in this direction by following the advice of the Revision Office and choosing the partnership of acquests as the legal regime. Such a regime rightly establishes the balance between husband and wife.

Chapter II

The Secondary Regime

49. We have had to refer to comparative law during our study of primary regimes because a complete primary regime does not exist under Quebec law and the few elementary fragments that we are able to find do not permit us to completely evaluate the importance of the primary regime with regard to the law respecting matrimonial regimes. However, the study of the secondary regime involves a completely different situation. Quebec law has always regulated the secondary regime quite thoroughly and since we can find all the elements required for its study, we will only refer to comparative law on rare occasions.

In this chapter, we will limit our study to general questions relating to secondary regimes (for there are several secondary regimes in Quebec as in most western countries). Indeed, we will analyze and criticize each of these regimes in Parts II and III of this paper.

We will therefore only examine the question of freedom of marriage covenants and the choice of the legal regime.

Section 1

Freedom of marriage covenants

50. The secondary matrimonial regime which will regulate the patrimonial organization of a family is too personalized for legislators to uniformly impose a single secondary regime on all married people. This is the main reason for the freedom of marriage covenants: the legislator leaves

each couple free to choose the matrimonial regime best suited to them. Indeed, one of the fundamental principles of our law respecting matrimonial regimes is that of autonomy¹³⁷, the only limitations on the freedom of the consorts being public order, good morals or prohibitory laws¹³⁸.

Consequently, we could question the reason for the very precise regulation of matrimonial regimes and even for the existence of a legal regime in addition to conventional regimes. First, we believe that the legislature must regulate matrimonial regimes with precision because they involve technical aspects that are too complex. The reason, however, for the existence of a legal regime requires some explanation. If the legislator considers that the patrimonial organization of the family requires special regulation, that is, if it considers that patrimonial relationships with respect to the family show characteristics that are different from business relationships for example, it is normal for it to take the necessary measures to ensure that such special and specific regulation applies to each family. Furthermore, since the principle of autonomy may, by ignorance or negligence, lead to people getting married without having previously entered into special agreements by marriage contract, the legislature proposes a so-called legal regime, as opposed to the conventional regimes. It also proposes other regimes, conventional regimes. These regimes are proposed in the Code and the legislature leaves the future spouses free to choose. However, the legislature enacts that, in cases where the future spouses do not choose a matrimonial regime, that is, in the absence of special agreements by marriage contract, such spouses are subject to the legal regime, that is, in Quebec, the regime of partnership of acquests¹³⁹.

We must point out that the future spouses may choose the legal regime and, in such case, they are not required to make a marriage contract. They may, on the other hand, choose by contract one of the conventional regimes proposed in the Code although it only proposes the main¹⁴⁰ conventional regimes. When deemed advisable, they may also invent a matrimonial regime that is totally different from those proposed by the Code. In such cases, it is important to examine the question carefully and draw up a contract containing all the clauses required for the regime to function well so long as it does not contravene public order, good morals nor any prohibitory law. However, the legislature sets fundamental conditions regarding the legal capacity of the contracting parties and the form of marriage contracts.

51. If the spouses wish to enter into special agreements by marriage contract in order to adopt a matrimonial regime that is totally or partially different from the legal regime, the legislature requires, as in all contracts¹⁴¹, that they be legally capable of contracting. However, the incapacity of one or of both spouses is no obstacle to making a marriage contract, although additional conditions must be met in such cases. Indeed, minors¹⁴², prodigals and persons of weak intellect¹⁴³ may also make all such covenants as the marriage contract admits of, provided they are duly assisted by the persons

who are legally required to participate so as to validate the consent of incapable persons.

Consequently, although minors are absolutely incapable of bequeathing property¹⁴⁴, as well as persons interdicted for imbecility, insanity or madness and, in certain cases, persons interdicted for prodigality¹⁴⁵, they may nevertheless include in their marriage contracts the conventional appointment of an heir and other dispositions in contemplation of death¹⁴⁶ since articles 1262 and 1263 C.C. permit these interdicted persons to make in their marriage contracts all such covenants as these contracts admit of and since article 1257 C.C. permits the conventional appointment of an heir and other dispositions in contemplation of death.

These contracts may be valid even if incapable persons act without being duly assisted by their tutor, curator or judicial adviser authorized in this respect by the judge on the advice of a family council. Indeed, the Code penalizes violations of the rules of articles 1262 and 1263 by a relative nullity which may only be invoked by incapable persons or by the persons whose assistance is required. However, in the case of minors, such nullity may no longer be invoked when a year has elapsed after they became of age, and in the cases of other interdicted persons, within a year of the solemnizing of the marriage. However, the legislature requires quite strict procedures to be followed in all marriage contracts.

52. Because the legislature considers that the patrimonial organization of the family must be precisely regulated without any possibility of doubts as to the will of the spouses, it requires that the marriage contract be made formally. Indeed, marriage covenants must be established before the solemnizing of the marriage by notarial deed en minute,¹⁴⁷ otherwise the contract would be null. The requirement that this contract be made before the marriage obviously only applies to the first contract or to subsequent modifications made before the solemnizing of the marriage¹⁴⁸ since article 1261 stipulates that this contract, or the legal regime, takes effect from the day the marriage is solemnized. The legislature wanted the first matrimonial regime to take effect from a specific date so as to prevent the spouses from setting other dates. This article, as we will see in our study of mutability, raises difficulties as to the effective date of a new matrimonial regime adopted during the marriage.

In addition to these formal requirements as to the form of the contract, the Code also requires that, in all cases, the contract be registered in the central register of matrimonial regimes¹⁴⁹ so that it may have effect with respect to third persons. However, this registration does not give us the complete picture of matrimonial regimes. Spouses who marry without making special agreements are not required to register their matrimonial regime¹⁵⁰ and furthermore, the registration notice prepared by the Department of Justice, which operates this service, only requires that the name of the regime adopted by the spouses be indicated¹⁵¹. The Code also requires¹⁵² that gifts be registered in the registration office of immoveables of the division in which

the donor is domiciled and that such registration be made during the donor's lifetime on pain of nullity of such gifts. In spite of the existence of the central register of matrimonial regimes, it seems that the registration requirements with respect to gifts remain¹⁵³. Consequently, if the marriage contract includes gift provisions, the spouses must register it twice so as to give it full effect.

This double registration requirement should obviously be corrected just as the central register should be a complete public source of information. Changes should therefore be made in this area.

Section 2

Choice of legal regime

53. The choice of the legal matrimonial regime is largely dependent on the idea the legislature has of marriage and the effect of marriage upon property. If the legislature considers that marriage must not affect property, beyond contribution to the needs of the family, it will choose a regime based on independent patrimonies as the legal regime. On the other hand, if it considers that marriage must affect to some extent the property of the spouses, it will choose a regime based on the partition of property as the legal regime because it wishes to consider the spouses' participation in the growth of the patrimony.

The legislature must also determine its position on the situation of the spouses between themselves. If it wishes an unbalanced situation between spouses, it will choose subordination techniques which have traditionally meant subordination for married women. If, on the other hand, it seeks to establish a balance between the spouses, it will adopt coordination techniques which have been the subject of recent reforms in matrimonial regimes.

The basic concept and techniques of the legal matrimonial regime have been chosen in Quebec.

54. The Quebec legislature has always chosen regimes based on the partition of property as the basic concept of its legal regime. Indeed, until July 1st, 1970, the legal regime in effect was the community of moveables and acquets¹⁵⁴ and it has since been the partnership of acquets¹⁵⁵. Both cases involve regimes based on the partition of property which acknowledges the effect of marriage upon the property of the spouses and their participation in the growth of the family patrimony.

The property to be divided is not identical in both cases. Indeed, such property under the community of moveables and acquets is composed of all moveable property that the spouses possessed at the time of the marriage as well as all property acquired during the marriage¹⁵⁶ with the exception

of immoveable property which falls to them by succession¹⁵⁷. On the other hand, the only property to be divided at the time of the dissolution of the regime under the partnership of acquests consists of the property acquired by the spouses during the marriage¹⁵⁸ with the exception of property received by gratuitous title¹⁵⁹.

Although the property to be divided is different—that of the community should, in principle, be more extensive than that of the partnership of acquests—the legislature desired that a large portion of the property be divided thus recognizing the participation of each spouse in the growth of the patrimony. Indeed, it seems to us that the reduction of the property to be divided does not relate in any way to the participation of the spouses in the growth of the patrimony. In our opinion, this reduction relates mostly to the socio-economic evolution which nowadays assigns a different value to property. Let us explain. The moveables had a negligible value (*res mobilis*, *res vilis*) when the community was adopted as the legal regime and more so when the communities were formed¹⁶⁰; as a result, these moveables were not necessarily included in the property to be divided for the purpose of increasing such property since the property that had some value, i.e., the immoveables, remained the private property of the spouse who possessed it prior to the marriage. Thus, when, with the evolution of society, it became apparent that moveables could be valuable, the reform made with respect to matrimonial regimes granted them the nature of private property when possessed by one or the other spouse prior to the marriage.

We can therefore say that, in spite of the different wording, the legislature had the same objective with respect to determining the property to be divided under these regimes. It is therefore normal that, in establishing the legal regime which was to become effective in 1970, the legislature excluded the property possessed by the spouses before the marriage from the property to be divided since moveable property can be just as valuable today as immoveable property. Furthermore, we can question the reason why the same legislature maintained the moveables possessed before the marriage within the property to be divided under the community of moveables and acquests that has since become a conventional regime. It may be that the legislature did not wish to upset the old legal regime too much since it was applying new provisions regulating the community of moveables and acquests to people married under the old legal regime¹⁶¹. However, this hypothesis, in our opinion, is not too valid since the legislature has considerably modified the rules governing the administration of property under this regime¹⁶². It may be, quite simply, that the legislature wished to keep this regime, and particularly the property to be divided, without adapting it to the present socio-economic evolution.

With respect to the basic concept, the Quebec legislature has maintained that of the partition of property. It seems to have made the right choice because it corresponds to the social situation. Indeed, even in contracts of separation of property, notaries try to palliate the total independence of the

patrimonies by way of gifts and also by way of testamentary clauses included to acknowledge the participation of both spouses in the growth of the family patrimony, and especially the participation of married women who do not perform any remunerative work. The legislature has thus maintained the choice it had made in 1866 which, today, still best corresponds to the needs of Quebec marriages.

55. However, drastic changes have been made regarding the techniques which the legislature has established to apply this basic concept of the partition of property. Indeed, for historical reasons¹⁶³, married women had been considered incapable and, as a result, the objective of the legal matrimonial regime was not to establish a balance between the spouses but rather to subordinate the wife to her husband with respect to the administration and disposal of the common property¹⁶⁴ as well as the wife's private property¹⁶⁵. In spite of later reforms, the regime of community of moveables and acquests, now conventional, still applies subordination techniques mainly due to the fact that the administration of the common property is entrusted to the husband¹⁶⁶.

The Quebec legislature's choice with respect to the techniques of the legal regime has resulted in a complete turnabout of the situation. Indeed, the legislature ratified the legal capacity of married women in 1964¹⁶⁷ and due to the reform of matrimonial regimes which followed, it was obliged to build its new legal regime, the partnership of acquests, around coordination techniques in order to establish a true balance between the consorts. The partnership of acquests thus offers a perfect balance between the spouses,¹⁶⁸ so that both consorts have the same capacity and the same limitations with respect to the disposal of acquests by gratuitous title *inter vivos*¹⁶⁹.

The Quebec legislature's choice regarding the techniques of its legal regime seems to be perfectly suited to the society for which it made such choice and this is proven by the numerous marriage contracts of separation of property which were made before the reform, in which the spouses sought the establishment of a balance more than the independence of patrimonies.

Conclusion of Chapter

56. In our opinion, the freedom of marriage covenants is a requirement and consequently a fundamental principle of the secondary regime. The very nature of a society based on the family requires that the spouses choose the secondary regime best suited to them in their particular situation.

Yet, because the patrimonial organization of the family must be clear and specific, it is normal for the legislature to submit those who have not chosen a secondary regime to a legal regime. The Quebec legislature did so by establishing the partnership of acquests as the legal regime. In spite of

some opposition by practitioners, this regime seems to correspond fully to the desires of Quebec couples as regards both its basic concept and its techniques.

However, should the future spouses be asked or required to choose a matrimonial regime that cannot be changed for the duration of the marriage, or, on the contrary, should we permit them, under certain circumstances, to change their matrimonial regime when it no longer suits their family situation?

Chapter III

Mutability of Matrimonial Regimes

57. Jurists have studied the problem of the mutability of matrimonial regimes for many years¹⁷⁰. The question was also raised in Quebec at the time of the last reform of matrimonial regimes and although the first draft published by the Revision Office maintained the principle of immutability of matrimonial regimes, the authors of this draft later changed their minds, due to unanimous criticisms of this principle, and thus proposed a controlled mutability of matrimonial regimes¹⁷¹. As a result, the principle of controlled mutability is now included in our law¹⁷².

We point out, however, that, in our law, the principle of mutability of matrimonial regimes is not as new as it may seem. It has existed in our Code since 1866 although its application was limited. Indeed, it was limited first because the change was recognized only in the case of community regimes¹⁷³; then, because only the wife married common as to property could request it¹⁷⁴, because it could only be obtained by judicial means¹⁷⁵; and finally, because this change could only be made in one direction, from a community regime to a regime of separation of property¹⁷⁶. However, the last reform of matrimonial regimes, which followed the examples of Switzerland¹⁷⁷, Holland¹⁷⁸, Germany¹⁷⁹, France¹⁸⁰ and numerous other countries¹⁸¹, included the principle of mutability of matrimonial regimes in our law. It was not adopted, however, without subjecting it to certain conditions and very specific requirements. The effective date of the new regime also raises certain difficulties of interpretation.

Section 1

Conditions for mutability

58. Article 1265 C.C. permits spouses to modify their matrimonial regime or marriage contract during the marriage. Such modifications may

be complete or partial. The spouses may change their matrimonial regime completely and adopt, for example, the partnership of acquests when they had adopted a conventional regime of separation of property by marriage contract. By special agreements, the spouses may also add special clauses to the legal regime or modify one or more of the clauses contained in their marriage contract. Such modifications may only be made, however, if both spouses agree to change their matrimonial regime or marriage contract. In the last case, with respect to the modification of gifts, the Code also requires the consent of all interested parties, that is, usually the donor and donee. The Code mentions interested parties because the donor may, in certain cases, be someone other than the spouses (a third person). The Code also requires that such modifications not prejudice the interests of the family nor the rights of the consorts' creditors. Such conditions seem fair in our opinion.

59. Indeed, if the purpose of mutability is to adapt the patrimonial organization of the family, the matrimonial regime, to the special circumstances of its evolution, the change of regime must be made in the interest of the family¹⁸² or, at least, it must not prejudice the interests of the family¹⁸³. It is up to the courts to decide, at the time of homologation, whether or not the new regime that the spouses intend to adopt is prejudicial to the interests of the family. However, to our knowledge, our courts have not yet made a decision on this matter. It seems to us that the change of regime should be brought about by changes in the family; it is hard to conceive that the spouses could change their matrimonial regime for no reason. For example, a change of regime could be justified if one of the spouses ceased to perform remunerative work or if one of them changed professions. However, in our opinion, any change sought in order to establish a better partition of the patrimony should be considered as not prejudicial to the interests of the family. On the other hand, if one of the spouses or the children were to be deprived of certain property by the change, proof that such change would be in the interests of the family should be required.

60. However, the interest of the family is not a sufficient requirement. Article 1265 C.C. also requires that the change of matrimonial regime or marriage contract be made without prejudice to the rights of the creditors. It is also normal for the Code to protect the rights of creditors at the time of the change of matrimonial regime. The matrimonial regime being an important aspect of the patrimonial organization of the family, it is important that the creditors of the family be protected from any fraud on the part of the consorts if the family's credit is to be preserved. Here again, it is up to the courts to determine, at the time of homologation, whether or not the change is prejudicial to the rights of the creditors. However, this condition should not be given an excessively restrictive interpretation for it could lead to the elimination of the present principle of mutability. Indeed, the rights of creditors, or their recourses, could be modified at the time of a change of matrimonial regime, but, if, in spite of such modifications, they

are still left with effective recourses, such a change could not, in our opinion, be considered as prejudicial to their rights, especially if we consider that the recourses available to creditors vary from one regime to another.

61. In our opinion, with respect to conditions for mutability, the courts should first consider the interests of the family because, if the change is brought about by such interests, there should not be any intention to defraud the creditors, and because the Code requires, among other things, that the creditors be served a notice of the motion for homologation. They would therefore be summoned and could then prove such prejudice to their rights before the courts. However, we do not wish to suggest that the courts should not also determine whether the change of regime is prejudicial to the rights of the creditors, but we are convinced that a change made in the true interest of the family is an indication of the absence of any intention to defraud creditors. In addition to these fundamental conditions, the Code requires that a change of matrimonial regime be made according to certain formalities.

Section 2

Formalities required at the time of the change of matrimonial regime

62. The Code requires that formalities be followed in order to protect both the interests of the family and those of the creditors. Such formalities relate to the form of the modifying agreements, to homologation by the court and finally, to registration.

As in the case of the marriage contract¹⁸⁴, the Code requires that the agreements made for the purpose of modifying the matrimonial regime or marriage contract must be established by notarial deed en minute¹⁸⁵. The modifying act therefore has the same formal character as the first marriage contract. However, this notarial deed is only the preliminary step and it has no effect without homologation by the court of the spouses' domicile.

63. The motion for homologation has raised certain procedural problems. Indeed, jurists have wondered whether notaries could present such motions and appear for their clients in court. After some notaries met with refusal, the Quebec Chamber of Notaries lodged a request before the Superior Court in order to obtain a declaratory judgment. The Court decided that notaries could appear for their clients in homologation proceedings since they are non-contentious matters¹⁸⁶. It also decided that, in case of dispute with respect to homologation, the proceedings then become contentious and automatically exceed the competence of notaries¹⁸⁷. Consequently, lawyers as well as notaries may present the motion for homologation and, as long

as the new marriage contract is not contested, practicing members of both professions may appear for their clients. Some also raised the question whether the motion could be presented before a judge in chambers. The Code is quite clear in this respect; it only mentions the court¹⁸⁸ and therefore such motion must be presented in practice court.

Furthermore, the Code does not only require that the parties appear in court. It also requires that a copy of the motion for homologation together with a notice of the date of its presentation be served on all the creditors of each of the consorts and, in the case of a modification of a marriage contract, on all the persons still living who were parties to the contract.

The Code settled the question of how a notice could be served on all the creditors by amending article 1266 in 1972¹⁸⁹ specifying that a list of the creditors of each spouse and of the community or partnership of acquets, if need be, with a balance-sheet indicating the assets and liabilities of each spouse and of the community or partnership of acquets, if need be, must be annexed to the motion¹⁹⁰. It then becomes easier to identify the spouses' creditors and to serve them notice of such motion. The Code also requires that a notice of motion be published in newspapers as provided for under article 139 of the *Code of Civil Procedure*¹⁹¹ in order to make sure that all the creditors become informed of the consorts' intention to change their regime or marriage contract. Such measures, in our opinion, would prevent any scheming by the spouses to defraud their creditors and, even if such fraud were attempted, the creditors may appear before the court to present their claims.

It is not difficult, however, to identify the persons still living who were parties to the previous contract. Distinction must be made between those who were parties and those who were involved in assisting an incapable person. It is not required that the latter be notified when the incapacity has since disappeared. For example, the minor's tutor should not be considered as a party to the contract if the minor has become of age at the time of the modifying act.

64. If the agreement to modify the regime or contract is approved by the court, the Code requires the protonotary or the clerk to render a copy of the judgment on the depositary of the original of the marriage contract or on the depositary of the original of any subsequent contract¹⁹². The same applies to any judgment which maintains an action for separation of property and separation from bed and board (the regime then becomes one of separation of property if the spouses were married under the regime of partnership of acquets or of community), as well as actions for annulment of marriage or for divorce (the regime is then dissolved)¹⁹³.

The depositary of the original marriage contract is bound to mention the judgment which was served on him, on the original marriage contract and on all copies that he may make of it, indicating all the information necessary for identification without error¹⁹⁴.

Thus, the new contract has full effect between the parties, but, as in the case of the first contract¹⁹⁵, the Code requires the registration of a notice in the central register of matrimonial regimes so that this change may have effect with respect to third persons¹⁹⁶. However, in the case of a conventional change of regime, the Code requires that such notice be rendered without imposing such requirement on anyone¹⁹⁷, whereas in cases of separation of property, separation from bed and board, annulment of marriage or divorce, this requirement is imposed on the protonotary or clerk of the court¹⁹⁸. It is possible, in the case of a conventional change of regime, for the judgment of homologation not to reach the central register and, consequently, for such change not to have effect with respect to third persons. It is a matter of speculation why the legislature did not require the protonotary or clerk to file a copy of the judgment on the central register especially if we consider that he must serve it on the depositaries of the originals of the other contracts. This is not a major difficulty in our opinion since the notary, if homologation is not contested, or lawyer, if it is contested, usually proceeds with the registration. However, if the protonotary or the clerk had been required to make such registration, delays or omissions which can cause embarrassing situations for the spouses could be avoided. The question raised as to the effective date of the new regime seems more embarrassing although it can be solved quite easily in our opinion.

Section 3

Problem raised by the date of the new regime

65. We pointed out¹⁹⁹ that the first legal or contractual matrimonial regime legally takes effect between the parties from the date of the solemnizing of the marriage²⁰⁰, although a marriage contract must be registered in order to have effect with respect to third persons²⁰¹. However, since article 1261 also provides that the parties cannot stipulate that the regime or contract will take effect at any date other than that on which the marriage is solemnized²⁰², a respected author has claimed that any change of matrimonial regime must be retroactive to the date of the marriage²⁰³.

Article 1261 establishes very clearly that the matrimonial regime takes effect from the day of the marriage and article 1266e, with respect to the partnership of acquests, as well as article 1272, with respect to the community of moveables and acquests, also establish that private property is distinguished from the acquests or common property on the day of the marriage. Do such provisions authorize interpreters to state that the change of matrimonial regime must have a retroactive effect to the date of the marriage? We do not think so. We have claimed that such statements were due to

negligence on the part of the Revision Office and that they appear to us as residual consequences of the old principle of immutability of matrimonial regimes²⁰⁴.

It is possible, however, to explain such statements by studying these articles in their context. Article 1261 obviously follows article 1260 in which the legislature imposes a legal regime on spouses who have made no special agreements by marriage contract. It is thus referring to the first matrimonial regime. This original regime, when established by contract, depends on the solemnizing of the marriage with respect to its effect; on the other hand, the legal regime will only take effect from such date. It is therefore normal for the legislature to set the day of the solemnizing of the marriage as the date of the beginning of this original regime. Furthermore, with respect to the partnership of acquests which is a legal regime, since the legislature has stipulated that it takes effect from the day the marriage is solemnized, it is quite normal that this day be considered, as a rule, as the date of the beginning of the original regime. This could also be claimed with respect to the community of moveables and acquests because it may be adopted by a simple statement to that effect in the marriage contract even though it is a conventional regime²⁰⁵. In our opinion, these texts cannot be interpreted as establishing a retroactivity at the time of the change of matrimonial regime. Of course, the legislature could have avoided discussions in this area had it specified that the day of the solemnizing of the marriage is the date of the beginning of the original regime only. Even without such specifications, we are of the opinion that there are sufficient arguments against the presumably retroactive effect of the change of a matrimonial regime.

66. It has been said that if the spouses decide to choose a new regime, it must be a better one and it should have been adopted from the beginning of the marriage²⁰⁶. However, this statement contradicts the reasons which had led the Revision Office to change its mind²⁰⁷: changes in the family may require a change of regime; the original regime might have been the most appropriate for a time, but it may no longer suit the family, and vice versa; the new regime may, at a given time, be the most suitable without being so retroactively or after a certain time. In our opinion, the principle of mutability requires that each regime be adapted to the period of time during which it suits the family. We believe that the retroactive effect of the change of matrimonial regime is equivalent to maintaining the principle of immutability. Indeed, the spouses are allowed to change regimes, but on condition that they only adopt a single regime for the entire duration of the marriage. The retroactive effect results in erasing the previous regime.

The principle of mutability relates to the opposite situation. It allows the adoption in time of as many matrimonial regimes as may be required by the evolution of the family. Controls are provided, however, in order to avoid needless changes²⁰⁸. In addition to this argument drawn from the very nature of the principle of mutability, the rules of interpretation and the provisions of the Code respecting the liquidation of matrimonial regimes may provide additional arguments.

67. One of the most important principles of the rules of interpretation is the presumption that the law has no retroactive effect save express provisions to the contrary²⁰⁹. Retroactivity cannot therefore be presumed, and the *Act Respecting Matrimonial Regimes* contains no such provisions. Furthermore, we find that the rule of interpretation applies if the articles dealing with mutability are interpreted in their context and analyzed with respect to other articles relating to the same Act.

Indeed, a conventional change of regime is one of the causes for the dissolution of the partnership of acquests²¹⁰ and the community of property²¹¹ and the regime must be liquidated according to the rules of one or the other of these regimes as soon as there is cause for dissolution. These rules include the partition of the acquests²¹² or of the common property²¹³ and the consorts are legally bound to exercise certain rights.

The retroactive effect of a change of regime would bring about a legally unexplainable situation. On the one hand, dissolution and liquidation should be effected in accordance with the rules of a regime which, assuming retroactivity, would have never existed between the spouses. On the other hand, at the time of partition, the spouses should have exercised rights which, again assuming retroactivity, they never would have had. Such contradictions seem to prove that the legislature did not wish to even implicitly establish the retroactive effect of the mutability of matrimonial regimes, which would not be sufficient grounds to counter the rule of interpretation.

Furthermore, another argument against retroactivity may be derived from a comparison with changes of regime obtained by judicial means. Indeed, separation of property judicially obtained only has a retroactive effect to the date of the institution of the action²¹⁴ and not to the date of the solemnizing of the marriage. It is readily understandable that such separation has a retroactive effect to the date of the institution of the action since it is an extreme measure sought to protect property.

It has been brought to our attention that the courts homologate modifying agreements without imposing retroactivity although they sometimes do not deny it when it is proposed by the consorts in the modifying act. However, the date usually retained is that of the judgment of homologation²¹⁵.

Conclusion of Chapter

68. The principle of mutability of matrimonial regimes is perfectly suited to modern legislation on matrimonial regimes. Indeed, this principle recognizes that the spouses' original choice may no longer suit the family after a few years or following changes within the family. A change of matrimonial regime must, of course, be subject to conditions and controls as it

is the case under Quebec law. The formalities and controls do not seem to raise any major difficulties, neither does the condition requiring that the change not prejudice the rights of creditors, especially since the 1972 reform.

On the other hand, the condition requiring that the change of regime should not prejudice the interests of the family, seems to raise difficulties regarding its application. The difficulties encountered could have been reduced if, like the French legislature²¹⁶, the Quebec legislature had formulated this condition positively, by specifying that the change must be made in the interest of the family. The interest of the family should have been considered as a cause of rather than an obstacle to change²¹⁷. Nevertheless, the difficulties raised by the application of this notion of family interest are mostly due to its recent existence under our law and, as a result, our courts have not yet had the time to determine its application and content. The notion of family interest is, of course, difficult to encompass but as we abandon individualistic concepts in the area of matrimonial regimes, and as we discover that matrimonial regimes are an important element of the patrimonial organization of the family unit, we shall draw nearer to a more precise notion of family interest and thus reduce the difficulties encountered with respect to its interpretation and application.

Conclusion of Part One

69. The choices to be made according to the title of our first part "Fundamental Options" belong to the legislature in many cases and to the future spouses in other cases.

It is up to the legislature to make the choice establishing a balance between the spouses and the family as well as between the spouses themselves. The first must be considered in the regulation of the primary regime. In this regard, the Quebec legislature has not yet adopted legislation providing for the establishment of a balance between the spouses and the family although the Civil Code Revision Office was to have proposed a draft to that effect.

On the other hand, the balance between the spouses relates to the secondary regime. The legislature must then choose the legal regime while permitting consorts to choose other regimes which could run counter to such balance. The choice of the Quebec legislature, the legal regime of the partnership of acquests, is perfectly suited to the objective of balance between the spouses and, in this choice, it is in perfect agreement with the recent evolution of matrimonial regimes. It nevertheless leaves the spouses free to choose other secondary regimes.

Another choice to be made by the legislature relates to the mutability of matrimonial regimes. In this respect, by acknowledging that changes in

the family may require changes in the secondary regimes chosen by the spouses, the Quebec legislature also agrees with the recent evolution of matrimonial regimes.

We must now proceed with the study of secondary regimes which we will complete in two parts. We will analyze regimes based on the partition of property in the first part and those based on independent patrimonies in the second part.

PART TWO

Regimes Based on the Partition of Property in Québec

70. Before undertaking the study of regimes based on the partition of property, we will briefly discuss the main stages of reforms which have been made in Quebec with respect to matrimonial regimes, although we did refer to them briefly before.

Reforms were usually undertaken in this field for the purpose of recognizing full legal capacity for married women. It was impossible, however, to carry out such reforms without involving matrimonial regimes. Reforms affecting the legal capacity of married women and subsequently matrimonial regimes always involved a difficult period of concern regarding the interpretation of certain articles of the Code.

71. The first important movements of reform in Québec began during the late twenties. The Government established an Inquiries Commission on August 14, 1929: the Commission on the Civil Rights of Women, whose task was to examine a series of questions and propose changes²¹⁸. The proposals submitted by the Commission in its third report were approved by the legislature²¹⁹. The main reform affecting matrimonial regimes established reserved property for married women²²⁰. It thus established, under all the regimes, a patrimony composed of the wife's working income. Such income was reserved for the wife's administration, and she could dispose of it for valuable consideration²²¹. This legislation also imposed slight limitations on the powers of the husband under the community of property²²² and permitted the wife to obtain judicial authorization to administer the affairs of the community in certain cases²²³. The legislation also defined the powers of women married under the conventional separation of property²²⁴; repealed the requirement of judicial authorization with respect to certain acts carried out by women in cases of separation from bed and board²²⁵; and introduced the community restricted to acquests as a conventional regime²²⁶.

These reforms, however, were not completely satisfactory, because married women remained practically incapable, especially under the regime of community of property, in spite of the palliative measure of the reserved property.

72. More than thirty years elapsed before the legislature closely re-examined the question of the legal capacity of married women and accidentally examined matrimonial regimes. Indeed, the Civil Code Revision Office presented its Report on the judicial capacity of married women to the Government on April 10, 1963²²⁷. The proposals contained in this report were approved a few months later, along with important amendments introduced by the Government²²⁸. The first objective of this legislation was to abolish the principle of the judicial incapacity of married women. However, the government's haste in passing such legislation resulted in partial reforms only of matrimonial regimes²²⁹. From then on, the principle of judicial capacity of married women was the rule. Nevertheless, since no important changes had been made in the matrimonial regimes, and especially since the community was based on subordination techniques, married women under this regime remained practically, if not totally incapable. We must point out, however, that the reforms introduced in the community began to open the way to techniques establishing a balance between the spouses²³⁰, although these techniques remained in a context of subordination²³¹. The reserved property is evidence of this. Introduced in 1931 to palliate to some extent the incapacity of the wife and her subordination to the husband, the reserved property continued to play the same role at the time of the 1964 reform but under the only regime where this situation still existed, the community of property²³². Indeed, since, under the regime of separation of property, the subordination of the wife was only the consequence of the principle of incapacity; once this principle was abolished, she became fully capable and the legislature deemed that she no longer needed reserved property.

73. The situation brought about by the 1964 statute could not last very long. Even before the Act was sanctioned, in November 1963, a committee of the Revision Office undertook to propose a thorough reform of matrimonial regimes. After having received strong criticism, their report was presented to the Government on May 20, 1968²³³. The draft was approved on December 12, 1969²³⁴ without having undergone major amendments, and it came into force the following first of July²³⁵. This statute made major changes in the law respecting matrimonial regimes. Seeking to establish a balance between the spouses, it introduced a new legal regime, the partnership of acquests, based on the partition of property but applying coordination techniques. On the other hand, the community of moveables and acquests which became a somewhat privileged conventional regime, also based on the partition of property, still applied subordination techniques mainly because it maintained common property and single administration. The statute also introduced other reforms with respect to conventional and

judicial separation of property and it abolished the prohibition of gifts and contracts between spouses, thus adopting the mutability of matrimonial regimes. We have already studied this last question²³⁶. We will now examine present Québec law with respect to matrimonial regimes by first studying the regimes based on the partition of property in this second part. In the first title, we will study the regime based on the partition of property using coordination techniques, that is, the partnership of acquests, and in the second title, we will tackle the regimes based on the partition of property using techniques of subordination of married women, that is, the conventional communities.

TITLE I

THE REGIME BASED ON THE PARTITION OF PROPERTY USING TECHNIQUES OF COORDINATION BETWEEN CONSORTS: THE PARTNERSHIP OF ACQUESTS

74. The partnership of acquests has been the legal matrimonial regime of Quebec since July 1st, 1970. Spouses who marry without making special agreements by marriage contract are subject to the provisions of the Code regulating this regime²³⁷. The legislature fortunately abandoned the previous wording which presumed an implicit choice by the spouses²³⁸. Indeed, we cannot assume, in all cases, that the spouses have not made a marriage contract because they consider the legal regime to be the one which suits them best. The reasons for adopting this regime differ. In some cases, it is adopted because, after having studied the matter, the spouses consider that the partnership of acquests suits them perfectly. In other cases, however, ignorance may take over, and the spouses will find themselves married under the partnership of acquests without being aware of the existence of such a regime and even without being aware of the existence of matrimonial regimes. Finally, in other cases, due to uncertainty and the variety of regimes available, the spouses simply accept the legislature's choice as a good one, aware, however, that they may change their matrimonial regime, for cause, if need be.

The Quebec legislature's choice, however, is explicit. It has deemed that the partnership of acquests is the matrimonial regime which is best suited to the sociological situation of Quebec. The only criticism that could be made with regard to its choice is that of not having based it on an inquiry into the content of marriage contracts, thus laying itself open to the criticism of those who confuse the title of a contract with its content. Indeed, it would appear that contracts of separation of property contain clauses whose objectives are identical or quite similar to those of the partnership of acquests. However, the label is often more intriguing than the content of a package

and some people may claim that the legislature has imposed a regime which is not desired by the population, whereas if the contracts were examined closely, one could reach the opposite conclusion.

We will study this regime by following the divisions used in the Code. We will therefore examine the composition of the partnership or acquests in the first chapter, its administration in the second chapter, and the dissolution of the regime in the third chapter.

Chapter I

Composition of the Partnership of Acquests

75. The legislature regulates the designation of the spouses' property under the partnership of acquests in Section I of Chapter First A of Title Fourth of Book Third of the Code. From the start, the Code establishes that there are two categories of property: private property and acquests²³⁹. The Code first defines the acquests and then draws a list of private property. Since the private property is established restrictively, constituting a *numerus clausus*, and since the acquests are a residuary category, accordingly, we will examine private property first, and then the acquests.

Section 1

Private property

76. In the evolution of the reform of matrimonial regimes, private property progressed from being a residuary category to being given a restrictive enumeration. Indeed, in its first report, the Committee of the Civil Code Revision Office conferred a residuary character upon private property although it established a quite lengthy list of such property in order to avoid possible interpretation difficulties²⁴⁰; acquests were then enumerated restrictively. These proposals made by the Committee²⁴¹ raised numerous criticisms which brought about a complete change²⁴², and in its final report, private property was enumerated restrictively, whereas the acquests became a residuary category²⁴³, and the statute was thus approved²⁴⁴.

This restrictive enumeration of private property allows us to determine two types of property: property which could be called immutable private

property and property which could be called mutable private property. In its enumeration, the law establishes private property which will always remain so as long as it is not involved in other transactions, that is, as long as it is immutable with respect to contractual relationships, it will not change nature. However, such property may change or preserve its nature, subject to compensation if it is involved in contractual relationships with acquests. Therefore, the growth of the patrimony of each spouse may change the nature of property, but not the value of the patrimony of each spouse. This is the reason why we classify private property into the two categories mentioned above: immutable private property and mutable private property.

Paragraph I

Immutable private property

77. As we have just indicated, it is property that is designated as private property by the Code and that will remain private property as a rule. The Code lists such property in articles 1266e, 1266h, 1266i and 1266k. We will study each of the categories of property included in these articles under two headings: property called private because of its origin and property called private because of its personal character.

A. Property that is private because of its origin

78. Property possessed prior to the marriage; property received by gratuitous title; property acquired in replacement of private property; and the proceeds of any capitalization in connection with private property are grouped under this heading. In these cases, it is the origin of the property which permits us to call such property private property.

1. Property possessed before the marriage

79. Under the partnership of acquests, it is normal for the Code to call private property all property possessed or owned by the spouses before the marriage²⁴⁵. Indeed, it is from the day of the solemnizing of the marriage or, according to our argumentation²⁴⁶, from the time of homologation, in the case where the partnership of acquests is adopted at the time of a change of matrimonial regime, that property acquired by the spouses must be taken into account for final partition. It is therefore normal for the Code to exclude from the property to be divided that which was owned by the

spouses, but also that which was in their possession availing for prescription. In the last case, a spouse may become owner during the marriage but by virtue of possession before the marriage. The same reasoning applies to all property acquired during the marriage by virtue of a pre-existing cause.

The Code clearly establishes the time when private property is distinguished from acquests: it is the day of the solemnizing of the marriage, at least for the legal regime. Difficulties with respect to proof may arise, however, due to the fact that, in certain cases, it may be impossible to determine whether certain property was possessed by a spouse before or after the date of the marriage. Immoveables and other registrable property (such as company shares), if effectively registered, do not raise any difficulties since the ownership date is unquestionable in such cases. Proof of possession before the marriage may be more difficult to make with respect to moveables. If no such proof is made, they are considered as acquests²⁴⁷. Of course, the presumption made under article 2268 favours the owner of the moveable as long as he can prove that he possessed it on the day the marriage was solemnized. Furthermore, proof by testimony is accepted when the value of the property does not exceed three hundred dollars²⁴⁸, or when the owner of the property has invoices or other documents which could be considered as a commencement of proof in writing²⁴⁹.

In order to avoid such difficulties of proof, the Chamber of Notaries indirectly enjoins its members in one of its formularies to include an inventory or an evaluation of the property of each spouse in the marriage contract under the partnership of acquests or somewhere other than in the contract but referring to it²⁵⁰. If one spouse or both have a large personal fortune before the marriage and if, in addition, it is composed of property the proof of which is difficult to make, it is obvious that an inventory of such property should be made or that a clause should be included in the contract generally describing and evaluating such property. On the other hand, if the spouses have little or no property or if they own property the proof of ownership of which is easy to establish (immoveables for example), an inventory before marriage by notarial deed is not necessary in our opinion.

2. Property received by gratuitous title during the marriage

80. The legislature has traditionally designated immoveables received by succession as private property²⁵¹. Under the partnership of acquests, the Code first broadens the traditional rule by abandoning the old categories according to which only immoveables had any value and by designating all property as private property. The Code also broadens the traditional rule by designating all property received by gratuitous title²⁵² as private property without consideration for the line [of successors].

Indeed, it seems to us that such property even that received during the marriage, is excluded from the acquests because it belongs to the patrimony

of the spouses by gratuitous title. In such case, the Code excludes this property from the property to be divided because the spouse has not participated in any way in the growth of the patrimony.

On the other hand, a different rule applies in the case of fruits and revenues which arise from property received by gratuitous title²⁵³. According to the general rule set forth with respect to acquests²⁵⁴, such fruits and revenues shall usually be acquests save an express provision to the contrary stipulated by the testator or donor.

3. Property acquired in replacement of private property

81. According to the notion of real substitution, when a spouse acquires certain private property, such property should remain private property²⁵⁵. Indeed, it is a simple case of replacing one property by another and, as long as the second has the same value as the first, such replacement does not upset the patrimony. Thus, there is no reason why the second should not retain the same nature as that of the first.

4. The proceeds of any capitalization

82. Since the Code stipulated that only the fruits and revenues arising from private property became acquests²⁵⁶ and not the capital, it is normal for the Code to specify in article 1266k that “the proceeds of any capitalization of reserves or surplus, of any distribution of a capital nature, as well as any redemption or prepayment premiums, and any subscription warrants, pertaining to securities which are private property of one of the consorts, remain his private property”. The legislature’s intention was to indicate as clearly as possible that any capital gain, not related to the fruits and revenues, arising from securities which are private property, remain the private property of the spouse.

In fact, this article only applies the general principle to a more complex case. It is difficult, however, to distinguish between the fruits and revenues on the one hand, and on the other hand, gains of a capital nature with respect to securities. In our opinion, it is impossible to make such a distinction without referring to the specific regulations and accounting rules of each company. We must not overlook the fact that certain companies show revenues in the form of capital gain in order to spare their shareholders from being taxed.

Applying the principle to securities is legally faultless and very logical. As in the case of property received by gratuitous title, it is normal that these capital gains be excluded from the property to be divided. However, because of the difficulties which may arise with regard to its application, we could question the advisability of applying the general principle to securities; it might have been desirable to adopt a rule of exception in this area.

B. Property that is private because of its personal character

83. In addition to the property that is private because of its origin, the Code includes in the list of private property other property that it is normal to exclude from the property to be divided, because of its very personal character. Such property includes that intended for personal use, property accruing to each spouse as a designated beneficiary, allowances, compensation and royalties.

1. Property intended for personal use

84. Because private property is a *numerus clausus*, the list drawn by the Code in this respect must be interpreted in a restrictive manner. It mentions clothing and personal linen as well as decorations, diplomas and correspondence²⁵⁷. They are very personal objects whose objective value could very well be minimal although they may have quite a high sentimental value for their owner. In spite of the clarity of this provision, we believe that two matters should be specified. First, jewellery is not included in this list and is therefore considered as private property if possessed before the marriage, provided proof can be made of this, or if it was received by gratuitous title. We do not know why the legislature chose not to formally designate jewellery as private property, but it may be that it considered that jewellery, which has a sentimental value in addition to a material value, would either be possessed before the marriage or received by gratuitous title and would then be considered as private property. It can also be private property when received by gratuitous title by virtue of the spouses' right to make customary presents to each other²⁵⁸. Furthermore, with respect to decorations, the Code should only include medals of honour.

2. Property accruing to each spouse as a designated beneficiary

85. Included under this heading are a series of situations which the Code also groups together, establishing that the property is private if it accrues to a spouse as a designated beneficiary. Indeed, all amounts, rights and other benefits accruing to each spouse as a beneficiary designated by the spouse or by a third party, under a contract or plan of annuity, retirement pension or life insurance, are private property²⁵⁹. We must however distinguish between the owner of the policy, in the case of insurance, and the designated beneficiary. The policy shall be private property or acquests according to the general rules of the regime, whereas the proceeds will always be private property if the beneficiary is designated by name, but will be acquests if the beneficiary is designated generically (the heirs, for example)²⁶⁰.

Such property is also called private because of its personal character. Indeed, if the holder of the insurance contract has designated the beneficiary by name, we have an *intuitu personae* provision and it is thus normal that it be private property.

3. Allowances

86. The Code also considers private property *the right* of a consort to an alimentary allowance, a disability allowance or any other benefit of the same nature²⁶¹, as well as annuities and retirement pensions which the payee cannot redeem or commute²⁶². However, all proceeds and revenues arising therefrom are acquests if they fall due or are received during the course of the regime or are payable, at the spouse's death, to his heirs and legal representatives²⁶³.

We must first point out the difference between 1266h and article 1266e,5. According to article 1266e,5, the spouse does not take part in the contract; he has simply been designated beneficiary by his spouse or by a third party. On the other hand, article 1266h regulates the situation where a spouse is entitled to an allowance either by law (alimentary allowance) or by contract (disability allowance, annuity or retirement pension). This distinction allows us to make another necessary one between article 1266h and article 1266i. Article 1266i which we will study in the next paragraph, only designates as private property that received as compensation for damages, arising from contractual or extra-contractual liability. These three provisions therefore regulate different cases although the situations may seem quite similar at first.

Why does article 1266h make a distinction between the right on the one hand and the proceeds and revenues on the other hand? It seems that all the cases regulated by this article have a very personal character and that, consequently, everything should be considered as private property according to the general rules of the partnership of acquests. The right is undoubtedly private and the amount of the allowance must also be considered as such²⁶⁴. However, because these allowances are usually paid by instalments which can include principal and interest and because of the difficulty raised by distinguishing in each instalment the principal (which should be private) from the interest (which is acquest), the legislature opted for a perhaps arbitrary solution, but one which avoids such problems, and has designated as acquests the proceeds and revenues²⁶⁵. However, if the allowance were paid in a total amount, such amount should be considered as the principal of the allowance and would therefore be private property, although the interest earned by the spouse, if he invested such principal, would be considered as acquests according to general rules. It seems that the main reason for making a distinction between the right on the one hand and the proceeds and revenues on the other hand, is the intrinsic difficulty raised in distinguishing what should be

private property and what should be acquests in the case of instalments including principal and interest. Consequently, in cases where no such difficulty arises, that is in the case of the total payment of the principal of the allowance, the distinction should not apply.

Perhaps aware of the fact that it was adopting a solution which favoured acquests, the legislature exempted from compensation the sums or premiums paid out of the acquests to obtain such allowances²⁶⁶.

Finally, in order to avoid fraud between the spouses, it excluded from article 1266h annuities and retirement pensions which the payee can redeem or commute²⁶⁷. They are thus always acquests. Such an exclusion is readily explainable. Indeed, if the rule of article 1266h applied to annuities or pensions which can be redeemed or commuted, spouses who could foresee an upcoming dissolution of their matrimonial regime could hasten to purchase such annuities or pensions out of acquests for the sole purpose of converting such acquests into private property and thus exclude it from the property to be divided. After liquidation, a spouse could also repurchase the pension and thus defraud the other spouse who could not even be entitled to claim compensation.

4. Compensation

87. The Code designates as private property “compensation received by a consort (spouse) after the solemnizing of the marriage as damages for injury, personal wrongs or bodily injuries as well as the right to such compensation and the action consequent thereon”²⁶⁸. The old rule contained in article 1279a has thus been extended to the two sources of liability, contractual and extra-contractual. Such compensation is, of course, of a very personal character and is logically excluded from the property to be divided. However, although the right, action and compensation belong as private property to the spouse who suffered the damage, the spouse could then invest the amount received and thus earn revenues from such private property which are acquests according to the general rule.

5. Intellectual and industrial property rights

88. The Code establishes the same distinction with respect to these rights as it does with respect to allowances. “Intellectual and industrial property rights are private property, but all proceeds and revenues arising therefrom and received during the regime are acquests”²⁶⁹. Although the distinction is identical, the situations may be completely different. Indeed, allowance instalments usually include principal and interest and are considered to be acquests. As we have said earlier, the form of payment should

be a determining criterion in interpreting article 1266h, although it does not seem of great importance with respect to intellectual and industrial property. According to the interpretation given to the draft bill by its writers²⁷⁰, the right has been identified with the principal and consequently, in order to apply these articles, we must determine whether the amount received consists of the principal only, whether it represents principal and interest or interest only. If it consists of principal only, it may be private property, whereas it will be *acquêts* in the other cases. Since the periodical instalments of an allowance usually consist of principal and interest, they are readily classified among *acquêts*. However, should the same apply in the case of payments received by virtue of a publishing contract for example? We do not think so. It seems to us that, with respect to intellectual and industrial property, the content of the contract by virtue of which the payments are made, should be analyzed. In order to determine the nature of such payments, we must establish whether the author has transferred his right to the publisher or whether he has simply authorized the publisher to publish his manuscript while retaining his *copyright*. In the case where the author has transferred his right and that the *copyright* thus belongs to the publisher, we believe that the payments he receives periodically are the price paid for the sale of his right and since the right is private property, the payments should also be considered as such. On the other hand, in the case where the author retains his *copyright*, the payments (which, according to general practice, are made in the same manner as in the case of the transfer of the right) will then be proceeds and revenues rising from his right and will therefore be *acquêts*. If, in the case of the transfer of the *copyright* the publisher had paid a lump sum to the author, no one could contest that such sum is private property. Why, therefore, is the solution different when the "sales price" is based on a percentage of sales and paid periodically? We see no reason for adopting a different solution because this situation involves the transfer of a right, which is private property, and not proceeds or revenues.

89. All the property that we have studied under the heading *immutable private property* will always remain private property in its immutability. However, its nature could be changed if the owner were to involve such property in transactions along with *acquêts*, except for property that we have termed "for personal use" which seems to retain the nature of private property under all circumstances. We have therefore grouped such private property that may change nature under the heading *mutable private property* which we will study in the next paragraph. We will not examine the case of transactions involving only private property because such cases simply require the general application of article 1266e,3, which we have already studied.

Paragraph II

Mutable private property

90. The legislature applies the maxim *accessorium sequitur principale* to determine whether the private property will remain private, subject to compensation in favour of acquests, or whether it will become acquests, subject to compensation in favour of private property, in cases where transactions involve both private property and acquests. We are pleased to notice that, with regard to matrimonial regimes, the legislature has abandoned the rule respecting accession to immoveable property according to which land is always considered as the principal²⁷¹ and that it has preferred the principles underlying the rules of accession to moveable property²⁷². Thus, with respect to the partnership of acquests, the legislature has established the relationship between the accessory and the principal according to the value, generally considering that the private property is the principal but also providing for the opposite situation when the acquests involved in the transaction have a value higher than that of the private property.

The Code provides for three cases under articles 1266f, 1266g and 1266j: property acquired with private property and acquests, a share in property acquired by a spouse who was privately co-owner, and property acquired as an accessory of or annex to private property as well as constructions erected on an immoveable which is private property.

91. The rule established by these three articles is quite simple on paper: when a transaction involves both private property and acquests, the property thus acquired remains private property if the private property was of equal or greater value than that of the acquests, subject to compensation by the private property in favour of the acquests. On the other hand, if the acquests had a greater value than that of the private property, the property thus acquired will become acquests, subject to compensation by the acquests in favour of the private property. This rule applies to all three cases taking their specific differences into consideration. However simple in theory, it nevertheless raises difficulties in application. These difficulties relate on the one hand to the time when property should be designated, especially in the case of transactions involving payment by successive instalments, and on the other hand, to the possibility of prejudice to the acquests in cases of successive and repeated transactions. We will now examine and attempt to solve these difficulties.

A. The time of designation of property

92. The general regulation of the partnership of acquests requires that the nature of each property always be determined with certainty as is evidenced by the three articles we are studying.

Consequently, it seems that when property is acquired with private property and acquests, such property should be designated at the time of the transaction and not at the time of the dissolution of the regime. However, the rule set forth in these three articles may cause difficulties in our society where the use of credit is widespread and where many purchases are made by instalments.

Let us suppose that a spouse purchases property as an accessory of private property and that he pays for it with a credit card. The sale is perfected by the consent alone²⁷³, but until payment of the bill, it is impossible to determine, according to the criteria set forth in article 1266j, whether the private property and its accessory remain private property subject to compensation or whether they become acquests subject to compensation in favour of the private property. The problem does not arise if the accessory is of little value, but it may if the accessory is more valuable. It arises more frequently in the case of immoveable transactions involving private property and acquests.

Indeed, immoveable transactions and many moveable transactions usually involve payment by periodical instalments which may, in certain cases, spread over several years. How, therefore, are we to apply the three articles in question? Should the nature of the property be designated at each instalment, taking into consideration whether such payment is made with private property or with acquests at the risk of changing its nature with each instalment? We do not think so. When a spouse purchases property agreeing to make periodical instalments, we can presume that these instalments will be made with acquests since all revenues are acquests under the partnership of acquests, except for revenues arising from property acquired by gratuitous title when an express provision to that effect has been made in the deed of disposition.

Furthermore, because of the presumption of acquests²⁷⁴, we could even state that any purchase is presumed to have been made with acquests, especially in the case of purchases paid by instalments for the reasons we have just mentioned.

The objection could thus be refuted. However, with respect to purchases on credit and by instalments, the legislature should have explicitly indicated that such purchases are deemed to be made with acquests. This would have cleared up all doubts on the subject. A spouse making such purchases with private property, or with private property and acquests while using a sufficient part of private property to preserve the nature of the property, could, of course, make proof to the contrary.

Consequently, although the problem of purchases on credit could be solved by the general regulations of the regime and especially by the presumption of acquests, in our opinion, the frequency of such purchases would have warranted a specific provision regulating such purchases in accordance with the general solution. In regulating the partnership of acquests²⁷⁵, the

legislature has sometimes enacted a single provision only for the application of a general rule to complex cases; however, we do not know why it chose not to specifically provide for the cases we are studying.

B. The possibility of prejudice to the acquests

93. The legislature has clearly favoured the acquests in its regulation of the partnership of acquests. The idea of partition of property upon dissolution directed its regulation throughout and it adopted provisions which, when in doubt or according to the consorts' will, increase the amount of property to be divided, as is evidenced by the residuary notion of acquests and the presumption of acquests. However, articles 1266f, 1266g and 1266j conceal a possibility of prejudice to the acquests.

As we have stated above, designation of the property must be made at the time of the transaction in order to be certain of the nature of the property at all times. Consequently, it would be possible to preserve the nature of property through successive and well-calculated transactions even if the addition of the sums used in such transactions would show that the value of the acquests used was greater than that of the private property.

For example, let us examine the case of a spouse who is privately co-owner of one fifth ($\frac{1}{5}$) of an immovable. He acquires another fifth ($\frac{1}{5}$) with acquests in a first transaction; because the value of the new share acquired does not exceed the value of the share of which he was privately co-owner, the property remains his private property subject to compensation. In a second transaction, when he is then privately co-owner of two fifths ($\frac{2}{5}$), he could acquire two fifths ($\frac{2}{5}$) with acquests and still preserve the private nature of his property. Finally, being privately co-owner of four fifths ($\frac{4}{5}$) of the immovable, he could acquire the last fifth with acquests and the entire immovable would be private property. Surprisingly enough, the spouse used one fifth ($\frac{1}{5}$) private property and four fifths ($\frac{4}{5}$) acquests and the property becomes private property subject, of course, to compensation in favour of the acquests.

The prejudice to the acquests may be temporary, of course, since the private property will owe compensation to the acquests at the time of dissolution. However, since compensation is paid at the end and since enrichment is valued as of the day of the dissolution of the regime²⁷⁶, the property could meanwhile completely perish and in such cases, compensation would not be due. On the other hand, the value of the immovable could be considered as having doubled, but since compensation can never exceed the expenditure actually made²⁷⁷, the acquests would not receive the four fifths ($\frac{4}{5}$) of the value of the immovable at the time of dissolution but what was paid at the time of each transaction.

We will examine the problems raised by the regulation of compensation under the partnership of acquests in more detail further on in our study but

it was necessary to include these observations here in order to better perceive the possibility of prejudice to the acquests by way of successive transactions.

Such successive transactions (of which we have given only one of many possible examples) can also prejudice even if only partly, the only provision respecting the protection of the family under the partnership of acquests. We are thinking of article 1267c which, in its second paragraph, permits the surviving or present spouse to require that his share include, at the time of dissolution, the family dwelling, household furniture and industrial, agricultural or commercial establishment of a family nature as form part of the mass for partition. Consequently, if, in our example given above, the immoveable acquired were the family dwelling, the surviving spouse could not require that it be included in his share in spite of the fact that four fifths ($\frac{4}{5}$) of it have been acquired with acquests.

94. The possibility of prejudice to the acquests exists; it may not be too frequent but it nevertheless exists. The legislature should at least have adopted a provision stipulating that if the compensation due at the time of the dissolution of the regime is greater than half of the value of the property, such property must change nature. In our example, the compensation due to the acquests could be greater than half of the value of the property if the property does not increase in value. The property should then be designated as an acquest subject to compensation in favour of the private property, compensation that would be limited to the actual expenditure made by the private property if the property were to increase in value. Such a provision would not solve all problems. The problem raised by the destruction of the property remains and, in our example, the property would probably preserve its private nature in the event of a major increase in value.

With respect to private property that we have called mutable, the legislature should perhaps have specifically provided for the case of successive transactions in order to avoid the dangers we have pointed out. Such a provision could have stipulated that, in the case of successive transactions involving private property and acquests, the property remains private if the total value of the private property used in such transactions equals or exceeds the total value of the acquests and that the property becomes acquests in the opposite case.

Both our proposals are clearly compatible with the general regulation of the regime which tends to favour acquests. We have had to approach the subject of acquests in our study of mutable private property and we will now study this directly.

Section 2. Acquests

95. As we have already mentioned²⁷⁸, acquests obtain the legislature's favour both in the final report prepared by the Revision Office and in the

legislation. Aware of the fact that the acquests usually form the largest patrimony, the legislature has favoured the acquests in order to permit the spouses to participate in the partition of acquests as completely as possible.

The Code does not draw an extensive list of acquests. Such a list is not necessary. The legislature simply adopts the residuary notion of acquests while giving a few examples and regulating special cases. It also adopts important provisions stipulating the presumption of acquests. Articles 1266d, 1266h and 1266l regulate the residuary notion of acquests and specific acquests, and articles 1266f, 1266g and 1266j regulate what we will call mutable acquests, as opposed to mutable private property. Finally, articles 1266m and 1266n enact the presumption of acquests. We will study each of these categories in the following paragraphs.

Paragraph I

The residuary notion of acquests

96. This notion is established in the first paragraph of article 1266d as follows: “The acquests of each consort include all property not declared to be private property by a provision of the present section”. Therefore, save an express provision designating property to be private, all property is acquests. Furthermore, since private property is established in a restrictive list, their interpretation must also be restrictive. Consequently, because of this residuary notion of acquests, the property to be divided will always tend to increase.

This residuary notion is one of the distinctive characteristics of the regime of partnership of acquests. Since the objective of this regime is to establish a balance between the spouses, the participation of each spouse in the growth of the other’s patrimony is always taken into consideration, participation which is acknowledged at the time of the partition of the acquests. Excluded from such partition is property in respect of which the other spouse did not participate in the growth because of its origin or personal character. Furthermore, one of the main arguments in favour of establishing the residuary notion of acquests is that which pointed out the imbalance which, according to the proposals of the first draft, could occur between a spouse who performs remunerative work and one who owns much private property and thus lives on his private means²⁷⁹. The residuary notion found in the Code corrects this imbalance. It also makes it possible to avoid complex accounts, allowing for a very large portion of property to be designated as acquests by the application of both the residuary notion and the presumption of acquests.

In spite of all the advantages of the residuary notion, the legislature deemed it advisable, in order to obtain greater accuracy, to establish a short list of specific acquests which are really only given as examples without limiting the residuary notion.

Paragraph II

Specific acquests

97. After having established the residuary notion of acquests, the same article 1266d stipulates that the acquests include in particular: (1) the proceeds of the spouses' work during the marriage and (2) the fruits and revenues which fall due or are received during the marriage and arise from all their property.

One first observation with respect to terminology should be made: the Code should have used the word "regime" instead of the word "marriage" in order to determine the period during which such fruits, revenues or proceeds of work will be acquests. Indeed, because of the present principle of mutability of matrimonial regimes, the duration of the legal regime may be different from the duration of the marriage. We do not think that the wording of the article could raise difficulties of interpretation in this regard, but it seems to us that the text would have been clearer and more compatible with the general regulation of matrimonial regimes if the legislature had used the word "regime" instead of "marriage".

By specifically designating these two categories of property as acquests, the legislature seems to have intended to include all earnings which may be derived from personal work. By using the expression "proceeds of work", it includes wages as well as fees, commissions, etc. It does not require a specific form of remuneration, any remuneration as a result of the work of a spouse shall be considered as acquests. This article must be given a wide interpretation, always attempting to include rather than exclude any proceeds of work. The residuary notion of acquests, which is merely expressed in this article, should be helpful in difficult or litigious cases.

Still specifying and not limiting the residuary notion of acquests, the Code mentions the fruits and revenues arising from all property. Here again, the Code prefers to use terms which have a very wide meaning and for good reason. We could ask whether the proceeds derived from private property are acquests according to this provision. Indeed, this question could arise due to the fact that, under the community of moveables and acquests, the Code treats certain proceeds differently²⁸⁰ and uses the same words fruits and revenues²⁸¹, the latter then being common property whereas proceeds may be private property. We do not hesitate to state positively that the proceeds of

private property are also acquests under the partnership of acquests, for the reason that nowhere in the regulation of the partnership of acquests are such proceeds designated as private property and that, in the absence of an express provision, we cannot presume such proceeds to be private property. Furthermore, the fact that a special article excluding certain proceeds exists under the community where the expression “fruits and revenues” is used, may be considered as evidence that the legislature deems the “proceeds” to be included in the “fruits and revenues”. Consequently, all earnings derived from all property belonging to the spouses are to be considered as acquests, save earnings of a capital nature²⁸².

98. The Code also specifies the nature of other property in two other cases regarding the proceeds and revenues arising from allowances²⁸³ and the proceeds and revenues arising from intellectual and industrial property²⁸⁴. We have analyzed these provisions in our study of private property²⁸⁵ and we do not deem it necessary to reexamine this question. However, we should point out that articles 1266h and 1266l are merely the application to special and more complex cases of the rule set forth in article 1266d,2. Furthermore, whereas this rule applies fully to intellectual and industrial property, it is stretched in the case of proceeds and revenues arising from allowances again for the purpose of favouring acquests. Indeed, as we pointed out earlier, when allowances in such cases are paid by instalments including principal and interest, the principal portion is also considered as acquests thus contradicting the principles which regulate the regime in this area. The difficulties already mentioned raised with respect to application have led the legislature to adopt a different solution in these cases although they could easily agree with the general regulation of the regime which tends to increase the amount of property that can be divided.

Paragraph III

Mutable acquests

99. As we have called certain private property mutable, it is possible to do so for acquests also. Indeed, articles 1266f, 1266g and 1266j contain two aspects or two sides of the same question. When a transaction involves both private property and acquests, their nature may change depending on the values used. It is impossible to study these articles from the exclusive point of view of private property or acquests. Therefore, we must have studied them from both points of view in our study of private property. We believe that we have raised the questions which should have been raised and we have also pointed out that each of these questions is reversible. Therefore, we simply refer the reader to that study²⁸⁶.

Paragraph IV

Presumptions of acquests

100. In addition to the residuary notion of acquests which may solve many problems, the legislature enacted a double presumption: the general presumption of acquests and the presumption of acquests held in undivided ownership. The first presumption, established in article 1266m, applies to all the property of a spouse the nature of which is unknown. The presumption of acquests held in undivided ownership, established in article 1266n, applies to all the property of both spouses the owner of which is unknown.

A. The general presumption of acquests

101. Article 1266m reads as follows: “All property is deemed to be acquests, saving proof to the contrary made, both as between the spouses as well as with respect to third parties, according to the ordinary rules of law”. We have analyzed earlier the difficulties which may arise with respect to making proof²⁸⁷ and we will attempt to analyze the purpose of this article here.

First, it is evident that this general presumption of acquests will solve many problems with respect to proof for when in doubt or in the absence of proof, the property will be acquests. This presumption also usually avoids keeping a detailed account of acquests and private property. It is not necessary to keep such an account under the partnership of acquests except in the case of a spouse who adopted the regime reluctantly and who wants to avoid at all costs the growth of the property to be divided by way of this presumption. It would be preferable for such a spouse to seek a change in regime and adopt the separation of property. However, people usually do not marry in such a frame of mind and the general presumption thus avoids such accounting in addition to solving problems of proof.

Another reason for adopting this presumption is undoubtedly in order to increase the property that may be divided. Indeed, the presumption will imperceptibly bring into the mass of property to be divided, property that could have been private property had it not been for such presumption. However, the spouses can also use this presumption willingly and thus change private property into acquests without demanding compensation by simply destroying proof or not making proof of the private nature of property. This seems perfectly valid and cannot be used with the intention of fraud. Indeed, there is no fraud on the part of a spouse who willingly changes private property into acquests without compensation; his spouse is seemingly not prejudiced since the value of his share in the acquests is increased; finally, we do not see how the creditors could be thus defrauded

since, even after partition, they may sue the non-debtor spouse to the extent of the benefit derived from it²⁸⁸.

This presumption comes fully into play at the time of the dissolution of the regime with respect to the formation of the mass of private property and acquests that will belong to each spouse. This presumption is very important and helpful in forming these two masses of property. Indeed, it is necessary to determine for each property whether it is property that is listed as private property by the Code and whether proof of the private nature of such property exists. Should the answer to either of these questions be negative, the property is acquests.

The general presumption of acquests can also be useful during the regime with respect to dispositions by gratuitous title. As we will see later on, a spouse cannot dispose of acquests by gratuitous title without the concurrence of his spouse²⁸⁹. Consequently, if a person disposing of property by gratuitous title cannot prove that such property is private property, the presumption then applies and the concurrence of his spouse is required.

This presumption therefore applies to all the property possessed by each spouse in order to determine the nature of property, but the Code has also provided for another presumption in order to settle an apparently more complex problem, that raised when the owner of the property is unknown.

B. The presumption of acquests held in undivided ownership

102. Article 1266n reads as follows: “Property with respect to which neither spouse can establish exclusive ownership is deemed to be an acquest held in undivided ownership each for one half”. It does not concern the property of one or the other spouse, but what we could call “family” property. Such property with respect to which neither spouse can establish exclusive ownership, may not be extensive but we can think of the household furniture, joint bank accounts, the content of safety deposit boxes taken in the name of both spouses. It is difficult and even impossible to establish exclusive ownership in such cases.

The legislature has sanctioned a rule which is both fair and effective for such cases. It is fair because we can assume that both spouses contributed to the acquisition of such property, but more so, it is effective because it avoids lengthy and sometimes useless research. This presumption of acquests held in undivided ownership can also settle many problems of proof and thus facilitate the dissolution of the regime. Like the general presumption, it also tends to increase the value of the property to be divided.

Conclusion of Chapter

103. The legislature has taken care to establish specific criteria of classification of property under the partnership of acquests even if, in our opinion, certain provisions could be more complete. In so doing, it did not lose sight of the purpose of the regime: the partition of the acquests at the time of dissolution, recognizing the mutual contribution of the spouses to the growth of each other's patrimony and the dynamic balance between the ownership of the property. These criteria are usually applied at the time of dissolution although it may be necessary to apply them during the regime when a spouse intends to dispose of property by gratuitous title.

Another very important aspect of the legal regime of Quebec is the desire to establish a balance between the spouses by coordination techniques. We will realize the importance of this aspect by studying the administration of the partnership of acquests.

Chapter II

Administration of the Partnership of Acquests

104. The techniques acknowledging a balance or unbalance between the spouses are usually found in the regulations respecting the administration of the matrimonial regime. The partnership of acquests has been regulated according to techniques of coordination between the spouses and the articles establishing the norms for the administration of the regime should therefore show a balance between the spouses. A balance does not absolutely mean the absence of constraints but rather the presence of constraints that are equally established for both consorts.

When the constraints or limitations on the capacity of the spouses are reduced to a minimum, the coordination techniques do not require many provisions. Indeed, it is then sufficient to establish the principle of autonomous administration and to point out the case of joint administration. The *Civil Code* only devotes three articles to the regulation of the administration of the partnership of acquests. Two of these articles, which are aimed at establishing equality between the spouses, have effectively created an independence between them; they are articles 1266o and 1266p which we will study in our first section. On the other hand, article 1266q confirms the effect of the family upon the property of the consorts and we will analyze it in the second section.

Section 1. Independence of consorts

105. Seeking autonomy and freedom for each of the spouses during the regime²⁹⁰, the regulation effectively established the independence of the spouses²⁹¹. The drafts prepared by the Revision Office had been strongly

criticized for their excessive acknowledgement of individualism in the regulation of the administration of property²⁹². The members of the Office turned a deaf ear to such criticisms and, keeping their commendable concern for equality, they maintained texts which make strangers of the spouses while they maintained their excessively individualistic and socially unrealistic concept of the spouses' debts. In spite of this artificial independence, the equality they sought could not be obtained because they did not accordingly modify the norms respecting the legal mandate.

This regulation provides for the autonomous administration of property which we will study in the first paragraph, and for the absolute separation of debts which will be the subject of the second paragraph.

Paragraph I

Autonomous administration

106. Article 12660 establishes the principle of autonomous administration, regulates the only limitation imposed on the spouses and specifically provides for insurance.

A. The principle of autonomous administration

107. This principle regulates all the acts entered into by each spouse with respect to his other property and it is established at the beginning of article 12660 as follows: "Each consort has the administration, enjoyment and free disposal of all his private property and acquests". With respect to the principle, the independence of each spouse is total and his other autonomy is just as complete. Marriage has no effect upon this aspect of the spouses' property and it would be inappropriate to criticize this principle with respect to the secondary regime had provisions been adopted in a primary regime. However, in the absence of such regime, we believe that the principle should have been maintained, but together with further limitations.

Indeed, this principle fully confirms the balance between spouses; both have equal capacity and may enter into all acts as they deem necessary with respect to their property, subject to the limitation we will now examine. The spouses' capacity is complete save an express limitation to the contrary. Because of this principle, there can be no doubt as to the capacity of a spouse to enter into an act with respect to his other property. Either there is an express limitation on the principle and the act must then be done in accordance with this limitation, or there is no limitation and the

spouse may act alone without limitation by the matrimonial regime. However, the legislature did provide for a limitation while establishing the principle.

B. The limitation on the principle of autonomous administration

108. Article 1266o also specifies at the end of its first paragraph that each spouse cannot “without the concurrence of his consort, dispose of his acquests by gratuitous title *inter vivos*, with the exception of modest sums and customary presents”.

This limitation is justified by the general regulation of the regime. Since the basic concept is the partition of property jointly acquired by the spouses, it is normal that they be forbidden to dispose of such property by gratuitous title *inter vivos*. Indeed, with respect to the property to be divided, it is not necessary to place a limitation on the spouse who wishes to dispose of property for valuable consideration. He could, of course, make a losing bargain, but in acts for valuable consideration, other property usually replaces that which came out of the patrimony of acquests of the one who disposed, so that, in principle, there is no prejudice to the property to be divided. The situation is quite different, however, in the case of dispositions by gratuitous title. Dispositions in contemplation of death do not create a vacuum in the acquests since the patrimony of acquests of the *de cujus* will be established at the time of death and his spouse will exercise his rights with respect to this patrimony. However, if the disposition by gratuitous title is made *inter vivos*, the owner of the acquests would be excluding from the property to be divided that which is being given and would thus deprive his spouse of a right which he has had since the marriage, even if he does not exercise this right until the dissolution of the regime. This is why the Code forbids such acts to be done by one consort alone. By requiring the concurrence of both consorts, the Code does not avoid the reduction of the acquests of the donor, but such reduction of property to be divided is done with the consent of the person who holds the right to demand half of the acquests at the time of dissolution.

As we can see, this limitation relates to the maintenance of a dynamic balance with respect to the ownership of property because the legislature wants everything acquired by the spouses while living together to be included in the final partition. The techniques applied are clearly coordination techniques because both spouses are subject to the same limitation and their concurrence makes it disappear.

109. However, this limitation on dispositions by gratuitous title is not absolute. The legislature has explicitly excluded from this limitation the disposition of modest sums and customary presents.

These notions are not foreign to our law. In a different context, with respect to the prohibition of gifts between spouses, the old law already accepted without any problem that spouses may benefit each other *inter vivos* where modest sums and customary presents were concerned²⁹³. In Quebec, our courts have always ruled that old article 1265 did not exclude customary presents as long as these presents were proportionate to the donor's wealth²⁹⁴. However, when such gifts involved exorbitant sums or sums disproportionate to such wealth, our courts ruled that they were prohibited²⁹⁵. They also had to decide on the notion of modest sums²⁹⁶.

In our opinion, although they relate to the old prohibition of gifts between spouses, these rulings could be useful in interpreting article 1266o because they correspond to an identical social context. It is obvious that, in applying these notions of modest sums and customary presents, both the social context and the donor's wealth should be considered.

110. Because of the limitation imposed on the spouses with respect to gifts of *acquêts inter vivos*, we may have to apply the general presumption of *acquêts* of article 1266m. If the spouse cannot establish proof that the property he or she wishes to dispose of by gratuitous title is private property, the presumption will apply and the spouse will require the concurrence of his spouse.

The concurrence of a spouse may even be required to dispose of property for valuable consideration. Indeed, with respect to third parties in good faith, article 184 presumes that a spouse presenting himself alone for the purpose of entering into an act concerning a moveable that is in his sole physical possession, has the power to enter alone into such act. However, we believe that if the moveable is not in his sole physical possession, if, for example, the moveable is in the family dwelling and if the spouse cannot establish proof of exclusive ownership, the presumption of article 1266n should apply. The property would then be presumed to be an *acquêt* held in undivided ownership and concurrence would be required to validate the act. On the other hand, if the property is in the sole physical possession of one spouse, such as a bearer-bond and if the act is done for valuable consideration, concurrence should not be required. Indeed, article 184 presumes the capacity of the spouse and, with respect to possession, article 2268 stipulates that actual possession of a corporeal moveable creates a presumption of title. Consequently, these two presumptions confirm the full capacity of the spouses and considering the principle of autonomous administration, it would be inappropriate to require concurrence in the case of dispositions of individually held moveables for valuable consideration.

However, the possibility of a spouse exceeding his or her powers remains. Article 183 of the Code provides for such a possibility under the partnership of *acquêts* as well as the communities. It stipulates that the spouse of the one who exceeded his powers has the right to ask for the annulment of the act. However, he must not have ratified the act and the action must be instituted in the two years from the date on which he had

knowledge of the act and never more than two years after the dissolution of the regime. A spouse is therefore not without any recourse against his spouse, but he has the burden of establishing proof of the nature of the property and of the act done so as to be able to prove that his spouse has exceeded his powers. Article 183 also permits the spouse who was not consulted at the time of the drawing up of a deed to ratify such act *ex post facto*.

C. Specifications with respect to insurances

111. In fact, the second paragraph of article 1266o gives precise details on annuities, retirement pensions and life insurances, but in order to avoid lengthy enumerations, we will use the word “insurances” in our study of these different contracts. Besides, the Code has regulated them in the same manner. Indeed, the Code specifies in the second paragraph of article 1266o that the limitation imposed on the principle of autonomous administration does not limit the right of a spouse to name a third person beneficiary of annuities, retirement pensions or life insurances, whoever this person may be. A similar specification also existed under the old article 1265 which permitted the husband to insure his life for the benefit of his wife and children without such benefit being considered as prohibited with respect to the wife.

The right of each spouse is not limited and he or she may even pay the premiums out of the acquests. However, article 1266o treats such sums or premiums paid out of the acquests differently whether the beneficiary is the spouse or the children, or a third person. Indeed, the Code stipulates that no compensation is due by reason of the sums or premiums thus paid if the beneficiary is the spouse or the children of either spouse. However, if the spouse has named a third person as beneficiary and has paid the premiums out of the acquests, his private property will owe compensation in favour of the acquests at the time of liquidation for the sums thus paid.

Like the other provisions respecting insurances, this text was the subject of lengthy discussions between representatives of life insurance companies and the Revision Office²⁹⁷ as well as during the debates of the Parliamentary Commission²⁹⁸. Such discussions resulted in the present text which excludes compensation when the beneficiary is a close member of the family, spouse, common children or stepchildren of one or the other spouse. However, in order to avoid any possibility of fraud²⁹⁹, compensation is due in all other cases when the premiums were paid out of the acquests.

Autonomous administration is only one aspect of this independence between the spouses. This independence sanctioned by the legislature is greater, at least in principle, with respect to the separation of debts.

Paragraph II

Absolute separation of debts

112. More than the absolute separation of debts, the Code regulates a *theoretically* absolute separation. Indeed, article 1266p stipulates that each spouse renders liable both his private property and his acquests for all debts incurred by him and also indicates that he is not liable for the debts incurred by his spouse, saving the effect of the mandates.

We have said a “theoretically absolute separation of debts” because in spite of the strong desire for independence, marriage necessarily imposes a minimal community of interests. Absolute separation with respect to personal debts is an excellent technique and must be maintained, in principle, as long as we also take into consideration another category of debts that are not personal to one spouse or the other but that were incurred in order to provide for the needs of the family.

A. The principle of absolute separation of debts

113. The first draft prepared by the Revision Office had already been strongly criticized in this respect. Critics pointed out the excessively individualistic character of this article³⁰⁰ and so did criticisms made after the act was sanctioned³⁰¹. Let us repeat that we are convinced that the nearly absolute freedom of each spouse with respect to the administration of all his property calls for the greatest liability with respect to debts. Freedom with respect to administration and liability with respect to debts should be completely symmetrical. We should remember, however, that the spouses are no longer single and that they usually live together and jointly assume their responsibilities with respect to their children. Consequently, if a spouse freely contracts personal debts, he must assume full liability for such debts. However, debts contracted freely and debts contracted to satisfy family needs are two different things.

Debts contracted before the marriage are no problem, the spouses were then single and thus fully liable for such debts out of their property. However, debts contracted during the marriage would have required a different treatment whether they had been personally contracted by a spouse or whether they had been contracted in order to satisfy family needs.

The rule of article 1266p is theoretically very clear: each spouse pays for the debts attributable to him out of his property. In practice, however, are debts contracted to pay for heat, electricity, telephone, grocery bills, the baker's and milkman's bills, the rent, children's clothes, car expenses, etc. . . , debts which are attributable to the husband or the wife? Are these debts that are freely contracted by one or the other spouse? Are not such debts rather

imposed on the spouses by their life in community and by the responsibilities they have assumed by reason of their marriage? Why, then, has the legislature turned a blind eye to this daily reality by refusing to consider it under article 1266p? Furthermore, we must not forget that many family budgets are practically completely drained by such expenses that we are finding hard to attribute to the husband or the wife. The legislature has refused to consider debts contracted in the interest or for the needs of the family as far as the secondary regime is concerned. It may not have been completely wrong in spite of our previous observations, because such debts must not be regulated under each of the secondary regimes, considering that it is the common denominator of all families. Rather, the legislature was wrong in not yet having regulated the primary regime. Without the substructure of the primary regime, certain pillars of the secondary regime do not touch ground, certain provisions, such as those we are studying, are cut off from reality.

However, the legislature realized the need to make a reservation to this independence of the spouses with respect to debts, a reservation which relates to the effect of the mandates.

B. Effect of the mandates upon the separation of debts

114. Article 1266p also stipulates that each spouse is not liable during the continuance of the regime for the debts incurred by his spouse, saving the provisions of articles 178 and 180. Consequently, the Code only recognizes one possibility of holding a spouse liable for debts contracted by the other—it is when one of the consorts acts as the other's mandatary. The separation of debts still applies, in principle, because the mandatary is only representing his spouse and the debt thus contracted is attributable to the mandate even if the creditor physically contracted with the mandatary. Therefore, at first, this is not an exception to the principle of separation of debts. However, the Code provides for two different mandates: the conventional mandate of article 178, and the legal mandate of article 180.

1. The conventional mandate

115. Article 178 explicitly permits each spouse to give the other a mandate to represent him or her in the exercise of his or her rights and powers under the matrimonial regime. It is normal that the spouses be permitted to entrust each other with responsibilities. When a spouse freely entrusts the exercise of certain rights which belong to him to his spouse by way of a conventional mandate, he thus assumes responsibility for the actions of his representative. The general theory of the mandate applies and it respects the separation of debts.

Furthermore, the conventional mandate is in perfect agreement with the equality sought by the partnership of acquests since each spouse has the power to give his other spouse a mandate. If a spouse were to receive several mandates from the other without himself giving his spouse a mandate, the inequality or unbalance would not be created by the legislature but by the spouses themselves in the exercise of their rights.

However, the joint application of the conventional mandate and the rule of article 181 could destroy this equality in certain cases. Article 181 stipulates that the spouse who has had the administration of the property of his spouse, administration which could be entrusted by a conventional regime, is accountable only for the fruits existing and not for those consumed before he has been put in default to render an account, save an express agreement to the contrary. Consequently, it is conceivable that the spouse who received a mandate to administer the property of his spouse could do so unsatisfactorily by neglecting to pay debts while consuming the fruits. At the time of rendering account, he would only be accountable for the fruits existing, excluding all fruits consumed; the legislature has perhaps deemed that such fruits could have been consumed in satisfaction of the needs of the family. In such case, the creditors could demand the payment of their unpaid claims from the mandatary spouse because the administrator of his property acted on his behalf whereas such debts should normally have been paid out of the fruits of the property entrusted to his spouses' administration. We thus realize that equity can be destroyed. However, this seems to be an unusual case in our opinion. We can state that equality or balance is maintained between spouses by the conventional mandate and the principle of separation of debts applies strictly. The consequences of the legal mandate are quite different.

2. The legal mandate

116. We have already outlined this question of legal mandate³⁰² and indicated that, in the present state of Quebec law, it should be studied with respect to the effect of this mandate upon the regulation of debts under each of the regimes. Because there are questions common to all regimes, we will study these questions now and also analyse the effect of the mandate upon the separation of debts under the partnership of acquests. When studying the other matrimonial regimes, we will only analyze the effect of the mandate upon the regulation of the regime with respect to debts.

(a) Scope of the legal mandate

117. Confirming the old law³⁰³ and a constant jurisprudence³⁰⁴, article 180 stipulates that "a married woman has, under any regime, the power to represent her husband for the current needs of the household and the main-

tenance of the children including medical and surgical care". This article, sanctioned in 1964, is not a new law. This mandate, then called household mandate, has always existed in our law. We could thus question the reason for the existence of such a mandate.

We have outlined the judicial context of this mandate earlier³⁰⁵. The household mandate was created by jurists and the courts under the aegis of the principle of incapacity of married women and in order to cope with daily household needs. Indeed, married women were then considered incapable and they required the authorization of their husbands in order to enter into any judicial acts on pain of nullity of such acts³⁰⁶. Since it was practically impossible to demand such authorization for acts relating to daily household needs, the courts conceived the notion of household mandate. This mandate being tacit and presumed, acts entered into by the wife became valid and, in her capacity as mandatary, she bound her husband. This technique is valid and justifiable in the context of incapacity of married women. It is questionable, however, in a context of equality or balance between consorts, because any unilateral relationship of subordination must be abandoned in such a context³⁰⁷.

118. The once jurisprudential and now legal principle is that a married woman can represent her husband for the needs of the household. In applying this principle, jurisprudence has developed a series of criteria which have allowed our courts to determine the scope of the mandate.

In order to recognize the existence of the mandate and thus hold the husband liable for debts, jurisprudence³⁰⁸ first applies an objective criterion: the expenses must correspond to the needs of the family³⁰⁹; if they do not cover these needs, the mandate is rejected and the husband is not held liable for debts contracted by his wife³¹⁰. However, this objective criterion is usually paired with another subjective criterion: the means of the husband. This subjective criterion has permitted our courts to recognize, as part of the mandate, expenses which fully correspond to the needs of the family and to the husband's means³¹¹. Because of his means, our courts have held the husband liable for expenses which, at first, could seemingly be excluded from the needs of the family³¹². However, when the expenses did not correspond to the means of the husband, the courts decided to reduce the amount claimed³¹³ or to flatly dismiss the husband's liability³¹⁴. In other cases, our courts have considered another criterion in addition to the above-mentioned ones, a criterion of circumstance. When the husband is unable to act, they have recognized as part of the mandate acts which, in other circumstances, would not have been recognized, such as the renting of an apartment³¹⁵.

By applying the objective and subjective criteria, our courts have usually held the husband liable when the family needs are concerned and when these needs correspond to the husband's means. However, these criteria are only applied when the consorts are living together. The discontinuance of life in community, especially when the husband pays an alimentary allowance to his wife, is a second objective criterion applied by our courts to dismiss the

mandate in the case of a *de facto* separation³¹⁶ as well as a judicial separation³¹⁷.

119. The husband may also revoke the mandate. Such revocation was possible and even effective³¹⁸ at the time of the household mandate but it did not always assure non-liability for the husband. The creditor could always establish proof that he had had no knowledge of such revocation and the husband could be held liable for debts contracted by his wife in spite of his revocation³¹⁹.

It would seem that revocation is more difficult since the inclusion of article 180 in our Code converting the household mandate into a legal mandate. Indeed, the second paragraph of this article allows the husband to free himself from liability provided that 1: he revokes the mandate and 2: that such revocation be made known to third persons who deal with his wife. It is not difficult to meet the first condition but it is practically impossible to meet the second. Indeed, the husband can advise the wife's usual suppliers that he has withdrawn the powers which article 180 conferred to the wife, but she may easily deal with other suppliers who could also be notified by the husband while the wife could be dealing with yet other new suppliers, and so on.

Although the revocation of the mandate appears to be practically ineffective, we must not think that the husband will always be held liable for debts contracted by his wife. Indeed, a husband will usually need to revoke the mandate when his wife spends excessively or when they have ceased to live together. In such cases, the criteria applied by our courts will permit him to be freed from liability with respect to such debts. We must also not forget that our courts have always applied a basic criterion, that relating to the means of the husband.

The comments we have just made in a very synthetical manner³²⁰ show that the husband may be held liable for debts contracted by his wife by way of the legal mandate, when the criteria maintaining the legal mandate exist. The mandate is therefore a one way street: if it exists, the husband will have to pay. How can this liability of the husband be included in the context of the separation of debts under the partnership of acquets?

(b) The effect of the legal mandate upon the separation of debts under the partnership of acquets

120. Article 180, along with all the jurisprudence which preceded it and which followed it, seems to destroy the equality between the spouses which article 1266p wanted to create with respect to debts. Indeed, the legal mandate exists under all the regimes and as a result, under the partnership of acquets, the wife can bind the property of her husband even if she may only do so for the needs of the family and within the means of her husband. On the other hand, under the same regime which seeks equality, the husband cannot by law bind the property of his wife under the same circumstances.

Created in a context of incapacity of married women and conceived with the subordination of the wife to her husband in mind, this legal mandate could still be acceptable under regimes based on subordination techniques. Thus, under the community of property, the mandate could be justified by the fact that part of the wife's property is common property and that such property is administered by the husband. If she were to be allowed to bind such property, the technique of the legal mandate could be appropriate.

However, how can we explain the fact that a spouse can bind the property of the other under a regime such as the partnership of acquests where each spouse is entirely free to administer his property, save gifts of acquests *inter vivos*, and where each spouse is liable for his debts? The equality or balance is destroyed because one of the spouses can enter into acts which bind the property of the other. Indeed, the wife can bind the property of her husband but the opposite is not legally established.

Of course, the solution to this dilemma of unbalance created under the partnership of acquests is not found with respect to the secondary regime, but without a primary regime based on a balance between the spouses and between the spouses and the family, the partnership of acquests could not fully reach its objectives.

The legal mandate, however, does not settle the question of the contribution of the spouses to the needs of the family. It basically settles the question of recourses available to creditors. Even if the husband has paid for the debts contracted by his wife by virtue of the legal mandate, he may demand his wife's contributory share because the Code also provides for the effect of the family upon the property of the spouses with respect to the vital needs of the family.

Section 2

Effect of the family upon the property of the consorts

121. The regulation of the partnership of acquests considers the effect of life in community upon the property of the spouse with respect to the essential needs of the family. Article 1266q establishes the principle of contribution of the spouses to the expenses of the household in proportion to their respective means. It is a principle of proportional contribution by the spouses, a principle which fully corresponds to the equality sought by the regime. In spite of this principle, certain difficulties of application arise because of the judicial context of this article.

Paragraph I

The principle of proportional contribution to the needs of the family

122. The principle is simply stated in article 1266q: the spouses must contribute to the expenses of the household; they contribute in proportion to their means. We have already pointed out³²¹ that the establishment of the proportional obligation to contribute to the needs of the family was usually enacted taking different methods of contribution into account. This article does not seem to have considered this possibility. It stipulates that the contribution must be made proportionately but, in the absence of other specifications, the word “*means*” usually corresponds to the property of each of the spouses. Consequently, this article only seems to provide for the aspect of contribution in the form of monies or other patrimonial property used to satisfy such needs. Contribution in the form of work by one or the other spouse seems to have been disregarded. The legislature only considered contribution in cash. It may have deemed that contribution in kind or in the form of work should not be considered because it is difficult to evaluate.

This principle of proportional contribution is usually a manifestation of the legislature’s desire to establish a balance between the spouses, and if balance is sought, it is normal that it be established according to the spouses’ ability to contribute. However, in our opinion, this ability cannot be limited to the ability to pay, it should include all possibilities of providing for needs. Indeed, the balance could be destroyed if we only considered the monetary aspect of contribution. For example, if only one spouse has income, we think that the provision of article 1266q would establish a balance because that spouse would then be solely liable for debts contracted for the needs of the family while the other spouse would contribute to these needs by his work. However, if both spouses have income, whether it be derived from work or capital, the balance could be destroyed: the one who contributes to the needs with his work would also have to contribute with his money and if the other only contributed with his money and in a similar proportion to that of the first, the latter would then be making a greater contribution since his work must be added to his money, work which would have required other expenses if he had not done it himself.

The balance can disappear when the proportionality of the contributions to the needs of the family is established on the basis of one form of contribution because, in fact, contribution is made in different forms. The courts are not forbidden to take work into consideration as a form of contribution³²², but we believe that they would be taking the legislature’s place although they would be performing a useful and desirable function.

However, difficulties arise not only with respect to balance and proportionality but also with respect to the application of the principle of proportional contribution.

Paragraph II

Difficulties of application of the principle of proportional contribution

123. One of the difficulties of application of the principle involves relationships with creditors. Article 1266q seems to apply only to the relationships between the spouses with respect to their proportional contribution; it does not establish norms with regard to creditors. Of course, the creditors can, by virtue of article 1266p, sue one or the other spouse who is their debtor but that is not the question, article 1266q must determine the debtor with respect to the contribution to expenses. This article only considers the relationships between the spouses, but it even allows them to call upon the courts when they do not agree on their contributory share³²³. However, this matter should be settled by the spouses except in cases of disagreement and when one spouse appeals to the courts. In our opinion, article 1266q could be classified, in this respect, in the same category as articles 165 and 173 which impose obligations and confer rights on the spouses. Our courts have decided that creditors could not, in principle, avail themselves of such rights³²⁴.

If, as we believe, article 1266q concerns only the relationships between the spouses, excluding creditors, the latter will only have the recourse available to them by virtue of article 180 under the partnership of acquets and. with respect to the contribution to household expenses, they may only sue the husband for payment by way of the household mandate. However, the husband may demand proportional contribution from his wife and may even ask the court to determine the contributory share of each if they cannot reach agreement.

We must not forget, however, that, with respect to contribution to needs, the courts do not readily intervene when they are asked to determine past contributory shares. Indeed, notwithstanding clauses in marriage contracts, they recognize that spouses establish other methods of contribution to the needs of the family and they refuse to intervene when the spouses seem to have agreed on such other contribution³²⁵. Therefore, if the husband has paid for the debts contracted in satisfaction of the needs of the family for years without claiming from his wife, we do not think that he can ask the courts to determine his contributory share retroactive to the time of the marriage. The court would most probably deem that the spouses had reached an agreement in this respect. However, how is the court to determine the future contributory share of each spouse? We must point out that if the spouses must call upon the court to determine their contributory shares, their marriage is most probably in serious trouble. However, the Code could have been more explicit and specific, it could have set modalities or criteria to determine the contributory share of each spouse and would perhaps have avoided involving the courts.

In spite of these difficulties, the principle of proportional contribution is not less valid and it fully corresponds to the objective of balance sought under the partnership of acquests. With respect to the secondary regime, it may be impossible or inopportune to find solutions to these questions which we felt should be raised.

Conclusion of Chapter

124. We have criticized the excessive independence of the spouses which resulted from the excessively individualistic character of the regulation respecting the administration of property and the separation of debts. On the other hand, with respect to the contribution to the needs of the family, we pointed out that this so-called independence could even lead to an unbalanced situation favouring the wife due mainly to the general context of the partnership of acquests. We also pointed out that these criticisms were not necessarily meant for the general regulation of the partnership of acquests but rather for the general regulation of the Code respecting the patrimonial organization of the family which is made through the matrimonial regimes. Indeed, the regulation of the partnership of acquests respecting administration seems well-balanced, in our opinion, if we consider the secondary regime only. In the absence of a true primary regime conceived with the same objectives, it may be difficult to achieve the objectives of the secondary regime. The secondary regime may give rise to criticisms and may have flaws which are not due to it but due to the flaws of the primary regime on which it is based. However, even if these flaws are caused by the absence of a primary regime, they become evident when studying the functioning and mainly the duration of the secondary regime and they indicate that, without the primary regime, the regulation of the secondary regime may be incomplete and, at times, even unrealistic.

Therefore, if we only consider the balance between the consorts in coordination techniques under the partnership of acquests, without consideration of the substructure, this balance is flawless. Unfortunately, it is impossible to proceed in this manner. The basic concept of the partnership of acquests is the dynamic balance between the spouses regarding the ownership of property and it is the dissolution of the regime which sets in motion the mechanism which leads to the partition of the acquests between the spouses.

Chapter III

Dissolution of the Partnership of Acquests

125. It is at the time of dissolution that most of the mechanisms of the partnership of acquests are set into motion in order to reach the final objective of the regime: the establishment of a dynamic balance between the acquests of the consorts by partition. The regulation of the partnership of acquests also seeks to maintain a static balance between the property which it has termed private property. Therefore, the full effect of the designation of property that we have studied earlier³²⁶ is felt at the time when one of the causes of dissolution triggers off the process leading to the partition of the acquests.

Aware of the difficulties inherent in any partition of property between persons who have lived together for a certain period of time sharing common interests, the legislature has provided for a quite elaborate regulation for the dissolution and liquidation of the partnership of acquests. It is by far the most technical and most frequently criticized aspect of the regime. We believe that the complexity of the regulation is only a reflection of the complexity of reality. Any situation is complex when it involves the partition of property between persons who had common interests which may have become conflicting interests. In this respect, the regulation of the partnership of acquests attempts to find ways out of this labyrinth.

We will study this regulation under three headings: the causes of dissolution, the consorts' option, and the liquidation of the regime.

Section 1

The causes of dissolution of the partnership of acquests

126. The partnership of acquests may be dissolved on the one hand when the spouses cease to live together, and on the other hand, when the

spouses, or one of them, decide that another matrimonial regime would be more suitable. Article 1266r of the Code briefly indicates the causes of dissolution of the partnership of acquests which we will examine by grouping them according to the criteria we have just mentioned.

Paragraph I

Termination of marriage

127. The matrimonial regime being the regulation of the patrimonial organization of the family constituted by the marriage, it is normal for the matrimonial regime to be dissolved when marriage ends. Marriage can end either by natural causes (the death or absence of one of the spouses), or when the spouses are, for cause, freed from their obligation of cohabitation (separation from bed and board), or when they obtain a judgment from the court breaking their conjugal bond (divorce). Marriage can also end when the courts recognize that the marriage was null.

A. The death or absence of a consort

128. Paragraphs 1 and 4 of article 1266r mention the death of one of the consorts and the absence of one of the consorts in the cases contemplated in articles 109 and 110 as grounds for the dissolution of the partnership of acquests.

The case of the death of one of the consorts does not usually raise any problems. The death certified by the act of burial³²⁷ brings about the dissolution of the regime. However, if the act of burial cannot be established, since 1969, a declaratory judgment of death³²⁸ may be obtained. This judgment has the same impact on the matrimonial regime as the act of burial. The declaratory judgment of death terminates the matrimonial regime. Furthermore, under the partnership of acquests (as well as under the communities where the situation is identical) the regime does not resume if the person who had been declared deceased reappears. It was dissolved by the declaratory judgment and the spouses may not continue to be married under the partnership of acquests unless they avail themselves of the principle of mutability and adopt it again as a conventional regime³²⁹. In such case, the legislature has adopted the same rule which existed³³⁰ with respect to separation from bed and board, a rule which is still in force but adapted to the new principle of mutability³³¹. The termination of life in community automatically entails the separation of property. Life in community may be resumed without any formalities after a judgment pronouncing

the separation from bed and board as well as after the reappearance of a spouse declared deceased by judgment, but a new contract must be made if the consorts wish to take up their matrimonial regime again.

Absence also brings about the dissolution of the partnership of acquests but the dissolution is provisional³³² until such time as the absentee is reputed to be dead³³³. If the absentee reappears, the regime remains dissolved although the absentee recovers his property in its actual condition³³⁴.

However, since the amendment to the Code permitting a spouse to obtain a declaratory judgment of death, we do not believe that many people have availed themselves of the regulation on absence. Indeed, there are no advantages to have the spouse declared absent if the disappearance of the spouse occurred in accordance with the requirements for the obtention of a declaratory judgment. On the other hand, if the conditions of the disappearance are not known, a spouse would be forced to apply the provisions on absence, in spite of their antiquated character, because of the excessively long delays required.

B. Divorce or separation from bed and board

129. The third paragraph of article 1266r groups the judgments pronouncing divorce, separation from bed and board or separation of property. We will not study the separation of property here because we have decided to group the causes of dissolution according to other criteria and because the separation of property does not bring about the termination of life in community but rather a patrimonial reorganization of the family.

Divorce, considered as a cause of dissolution of the partnership of acquests, does not raise any special problems, at least not any more than separation from bed and board or death. Indeed, article 208, in perfect agreement with article 1266r, indicates that "divorce carries with it dissolution of the matrimonial regime". Therefore, with respect to the partnership of acquests, the legal regime, divorce brings about dissolution by setting in motion the mechanisms which lead to the partition of acquests. Separation from bed and board has the same effect upon the legal regime because, even though article 208 establishes that it carries with it separation of property, it still agrees perfectly with article 1266r which stipulates that the separation from bed and board or the separation of property are causes of dissolution of the partnership of acquests.

There are, of course, other questions which are raised at the time of a divorce or separation from bed and board as at the time of death. Indeed, because the conjugal bond is broken or because of the disappearance of the obligation of cohabitation, the court may make a decision with respect to alimentary allowances, or, in the case of a conventional regime con-

taining gift provisions, the court may decide whether such gifts are to be forfeited or claimed. The first question is concurrently provided for by the *Civil Code* and the federal *Divorce Act*³³⁵, however, the second question is provided for by the Code only³³⁶. These questions have a certain impact upon the economic situation of the consorts but they go beyond the causes of dissolution of the partnership of acquests. Divorce or separation from bed and board as causes of dissolution are one matter, but another judicially different matter is the question of alimentary allowances and the question of forfeiture or claim of gifts, where the partnership of acquests was adopted by contract containing gift provisions, at the time of a divorce or separation from bed and board.

The problem of alimentary allowances like that of the care of children, exceeds the framework of a specialized study on matrimonial regimes. On the other hand, the question of forfeiture or claim of gifts agreed to by marriage contract will be studied with respect to conventional regimes and more specifically in our study of gifts made by marriage contract.

130. With respect to the causes of dissolution of the partnership of acquests, it is important to determine when the judgment pronouncing divorce or that pronouncing separation from bed and board sets in motion the mechanism of dissolution of the legal regime. With respect to divorce, article 211 answers this question by indicating that “divorce produces its effects only from the date on which a final judgment makes absolute the decree nisi which granted it”. The date of the judgment pronouncing separation from bed and board should also be the date of the dissolution of the partnership of acquests³³⁷. Indeed, even if article 1422 stipulates that separation of property has a retroactive effect to the day of the institution of the action, we do not think that this rule can be applied to separation from bed and board. The issue of the dispute is different in each of these cases; with respect to the separation of property, the dispute relates to the property and it is normal for the effect of the judgment to be retroactive to the time when the spouse referred the matter to the court. On the other hand, in the case of an action for separation from bed and board, the issue of the dispute relates to the impossibility of continuing life in community and the separation of property is only a consequence of the separation from bed and board. Therefore, once the absolute judgment pronouncing divorce is obtained or that pronouncing separation from bed and board, the parties must choose a practitioner who will prepare a report on the partition. If the parties do not accept this report, in whole or in part, they may again appeal to the courts to settle the dispute with respect to the property.

131. However, the fact that the spouses must wait for the judgment absolute pronouncing divorce or that pronouncing separation from bed and board does not mean that they are deprived of all conservatory remedies with respect to the property during the proceedings. Although the second paragraph of article 211 only grants the right of conservatory remedies to the wife in the case of divorce, it refers to articles 814 and 815 of the *Code*

of *Civil Procedure*³³⁸ which only mentioned the wife at the time (May 2, 1969). These articles were amended later³³⁹ and now grant the right of conservatory remedies to both spouses with respect to the dissolution of the matrimonial regime. Therefore, although the new article 211 only mentions the wife, the husband as well as the wife may demand such conservatory remedies³⁴⁰ because the new articles 814 and 815 of the *C.C.P.*, enacted at a later date, mention the spouses. Furthermore, although article 813 of the *C.C.P.* does not mention divorce, the reference made in article 211 *C.C.* to articles 814 and 815 of the *C.C.P.* leaves no doubt as to the possibility of demanding conservatory remedies with respect to moveables and immoveables in the case of divorce as well.

Since the coming into force of the *Act amending the Civil Code*³⁴¹, some have wondered whether the Divorce Division of the Superior Court had competence to decide on matters relating to the property of the spouses with respect to separation from bed and board and divorce³⁴². We will not examine here the court's competence with regard to allowances³⁴³ or gifts provided for by contract for the reasons we have stated earlier³⁴⁴. However, we must examine the competence of the Divorce Division of the Superior Court with respect to the conservatory remedies provided for by the *Code of Civil Procedure*. In this regard, we must point out that in spite of the comparisons made between the competence of the Superior Court in matters of bankruptcy and in matters of divorce³⁴⁵, our courts reject such a comparison by relying on textual arguments³⁴⁶. Confirming a well-documented judgment from the Superior Court³⁴⁷, the Court of Appeal decided that the Superior Court was indivisible³⁴⁸ and although its judgment, with respect to the competence of the Court, was limited to alimentary allowances, it seems to have a general application³⁴⁹. Furthermore, with respect to conservatory remedies, our courts hearing matters of divorce agree to decide on such remedies³⁵⁰ although, in certain cases, they require that these remedies be introduced according to the formal requirements set by the *Code of Civil Procedure*³⁵¹, that is by a writ of attachment.

It would seem, therefore, that although the debate is not yet closed, each spouse may ask the court for conservatory remedies provided for by the *Code of Civil Procedure*. However, in cases of divorce, such remedies should be requested apart from the petition for divorce and according to the formal requirements set by the *Code of Civil Procedure*.

Such conservatory remedies prevent the disappearance, during the proceedings, of property to be divided, thus assuring the liquidation and partition of the acquets according to the norms of the regime.

C. Annulment of marriage

132. Article 1266r does not mention the judgment pronouncing the nullity of the marriage as a cause of dissolution of the partnership of

acquêts. This is normal, in our opinion, because either the marriage is null for all legal purposes and in such case a regime that has never existed cannot be dissolved, or the marriage is considered putative³⁵² and in such case, according to the provisions of articles 163 and 164 of the *Civil Code*, it may produce civil effects either with regard to both consorts, if they contracted in good faith, or at least in favour of the one who contracted in good faith at the time the marriage was solemnized. One of these effects is the dissolution of the matrimonial regime which would have existed between the consorts had the marriage been valid and although the old article 1310 also did not mention nullity of marriage as a cause of dissolution of the community, our courts have not hesitated to grant civil effects to putative marriages with respect to the spouses' property³⁵³ and especially with respect to the dissolution of the community³⁵⁴.

The spouses may also take advantage of the conservatory remedies provided for by articles 814 and 815 of the *Code of Civil Procedure* at the time of an action for marriage annulment.

Therefore, any termination of marriage, whether it be natural or judicial, brings about the dissolution of the partnership of acquêts. However, the regime can also be dissolved for reasons which relate to the economic reorganization of the family without bringing an end to life in community.

Paragraph II

Economic reorganization of the family

133. The causes relating to the economic reorganization of the family are the conventional change of matrimonial regime and the judgment pronouncing the separation of property. The main difference between these two causes is that the conventional change of regime may only take place when both spouses agree to do so whereas the separation of property may be requested by either spouse. Another difference relates to the new regime: at the time of the conventional change, the spouses may remake their initial choice while meeting the fundamental conditions and formal requirements we have already examined³⁵⁵, whereas in the case of a judgment pronouncing the separation of property, the spouses are necessarily subject to the regime of separation of property.

We have already submitted the reasons why we believe that, at the time of a conventional change of regime, the new regime takes effect from the date of the judgment of homologation with respect to the consorts although the effect of the change with respect to third persons is subject to the registration of the judgment in the central register of matrimonial regimes³⁵⁶.

In our opinion, it is not necessary to further examine the conventional change of regime as a cause of dissolution of the partnership of acquests.

134. We should, however, analyze the questions raised by the judicial separation of property under the partnership of acquests.

Article 1440 of the Code stipulates that, under the partnership of acquests, either consort may request the separation of property “when it is revealed that the application of the rules of the regime is contrary to the interests of the household”. In our comments on article 1429 of the first draft prepared by the Revision Office, we pointed out that this provision—the source of present article 1440—was incompatible with the principle of immutability which was upheld at that time³⁵⁷. This comment has lost some of its validity because of the present principle of mutability; however, it could be useful to us in our attempt to understand the motives which can justify a petition for separation of property.

First, according to the general regulation of the partnership of acquests, it is normal for both husband and wife to have the right to request the separation of property. Each has the administration of his patrimony, a portion of which will be divided at the end, so that it may be advantageous for either of them to cause the liquidation of the regime. The only condition set by the Code is that the rules of the regime be contrary to the interests of the household. By using the expression “interests of the household”, did the legislator intend to permit the separation of property in cases other than the conventional regime where he uses the expression “interests of the family”? There is no explanation given in this regard in the drafts prepared by the Revision Office³⁵⁸ nor at the time of the debates of the Parliamentary Commission³⁵⁹. We had indicated that the expression “interests of the family” seemed more appropriate than “interests of the household”³⁶⁰. However, the latter was maintained. The interpretation of article 1440 from an individualistic point of view could limit the possibilities of judicial separation only to cases where the application of the rules of the regime would prove to be contrary to the interests of the consorts. However, one of the general meanings of the word “household” is “of or everything relating to the maintenance of a family”³⁶¹ and we are aware of the interest shown by the Revision Office in using words in their general meaning according to dictionaries³⁶². We could perhaps think that the legislature did not want to reduce the possibility of requesting judicial separation for the interests of the spouses only. With respect to the conventional change, the expression “interests of the family” is used in article 1265 where the consorts must agree to make the change. We find it hard to accept that, in the case of judicial separation where the spouses do not agree to change the regime and where the danger may be greater, the legislature intended to completely disregard the broader dimension of family interests. The lack of uniformity in the terminology of articles 1265 and 1440 would lead to an inadequate restrictive interpretation resulting in certain grounds for judicial separation being disregarded.

However, the legislature maintained and improved the provisions which established the effects of judicial separation³⁶³. It confirms in article 1442 that separation of property judicially obtained has a retroactive effect to the date of the institution of the action. It also specifies in the same article that that has no effect so long as it has not been carried into execution in the manner provided for in the *Code of Civil Procedure*. Therefore, to determine the end of the partnership of acquests, we must refer to the date of the institution of the action when the judgment for judicial separation of property was carried into execution. We point out that the execution of the judgment is not required if the separation of property is a consequence of a judgment pronouncing separation from bed and board.

135. Therefore, the partnership of acquests is dissolved when either of these causes of dissolution occurs. However, before undertaking the partition of the acquests, each spouse, or their heirs, must decide whether or not he will accept the partition of the acquests of his spouse.

Section 2

Option of the consorts at the time of dissolution

136. Article 1266s states that, after the dissolution of the regime, each spouse has the option of accepting or renouncing the partition of the acquests of his consort and that this option remains in spite of any agreement to the contrary. Thus, after dissolution, each spouse must decide whether he wishes to exercise his right in the partition of the acquests of his spouse or whether he renounces it. His decision does not affect that of his spouse who may decide differently. They are, in fact, two parallel and completely independent decisions: the husband must choose between acceptance and renunciation of the partition of his wife's acquests, and the wife must make the same choice with respect to her husband's acquests. This choice is of prime importance because the decision to proceed or not with the liquidation of the spouses' patrimony depends on the spouses' choice.

Although the objective of the partnership of acquests is the partition of such property at the end of the regime, it is normal that this partition not be imposed on the consorts against their will. The reason that the Code grants this option to each spouse with respect to the acquests of his spouse is that each freely administered his acquests. Therefore, the acquests of one spouse could show a deficit and his spouse could then quite simply renounce the partition.

Because of the importance of this choice with respect to the liquidation of the regime, the Code has regulated the acceptance and renunciation by

the spouses. It has also established specific norms regulating the case where the regime is dissolved by the death of one of the spouses. We will study each of these matters in the three paragraphs of this section.

Paragraph I

Acceptance of the partition of the consort's acquests

137. Article 1266t determines two forms of acceptance: express and tacit. However, the Code also provides for cases of forced acceptance although it does not refer to them as such.

With respect to express acceptance, the Code only mentions this possibility without providing for modalities or specific formal requirements. A notarial deed, of course, constitutes a means of express acceptance of the partition of the spouse's acquests but any other written document may also constitute an express acceptance. We point out that this form of acceptance may be useful, even necessary, when one or both spouses wish to proceed with the liquidation and partition of the acquests as soon as possible, otherwise, tacit acceptance may take place with the passage of time. Indeed, the second paragraph of article 1266u presumes acceptance if the spouse has not registered his renunciation within a delay of one year from the day of the dissolution of the regime. Thus, if the spouse has not expressed his intention to accept and if he has not registered his renunciation within the prescribed time, he is deemed to have accepted.

138. There lies the only possibility of tacit acceptance. The draft bill contained a provision which read as follows: "Tacit acceptance may result especially from the intermeddling of a consort in the administration of the acquests of his spouse subsequent to the dissolution of the regime"³⁶⁴, thus giving an example of tacit acceptance. This article, which corresponds to our present article 1266t, was the subject of quite lengthy discussions in the Parliamentary Commission³⁶⁵ and was finally adopted as proposed by professor Crépeau: "Tacit acceptance may result especially from the fact that a consort has intermeddled in the acquests of his spouse subsequent to dissolution"³⁶⁶. However, without any further amendments by the Commission nor the National Assembly, it was sanctioned as follows: "The consort who has intermeddled in the property of the partnership subsequent to the dissolution of the regime cannot renounce the partition"³⁶⁷.

This "phantom" amendment of the second paragraph of article 1266t must have been made when the text of the Bill was reprinted before its presentation to the Assembly for second reading³⁶⁸.

The effect of this amendment is that where intermeddling had been proposed as one of the possibilities of tacit acceptance, it became a case of

forced acceptance. This new text can also raise certain difficulties of interpretation because of its use of the expression "property of the partnership"³⁶⁹. Does this property consist of the acquests of the consort or of those of his spouse? It seems quite evident that one cannot intermeddle in one's own property and that, consequently, the property in question must necessarily be the acquests of the spouse. The amendment was inappropriate in our opinion and we do not know by whom and by what authority it was made.

In the last paragraph of article 1266t, the Code specifies, however, that "conservatory acts or those of mere administration do not constitute intermeddling", thus permitting renunciation, by the spouse who is merely preventing the deterioration of the acquests of his spouse³⁷⁰.

In addition to intermeddling which results in forced acceptance, article 1266w provides for another case of forced acceptance, subject to a penalty, when the consort has abstracted or concealed acquests belonging to his spouse. In such case, he is declared to have accepted notwithstanding any renunciation and, as a penalty, he is deprived of his share in the acquests thus abstracted or concealed. Such forced acceptance is not new in our law. An identical provision exists with respect to widows under the regime of community in article 1348. The penalty also exists under the community; article 1364 applies to both consorts and deprives the one who has abstracted or concealed effects belonging to the community, of his share of such effects.

Save these cases of forced acceptance, each spouse may renounce the partition of the other's acquests.

Paragraph II

Renunciation of the partition of the consort's acquests

139. The legislature requires that renunciation be made in specific forms and within the prescribed time. In spite of the right of each spouse to renounce the partition of the acquests of his spouse and in spite of a renunciation made in the prescribed forms and delays, he grants to the creditors of the spouse who renounces, rights in the acquests of the spouse when renunciation was made in fraud of the creditors' rights.

140. As in the case of the marriage contract or the conventional change of regime, article 1266u requires that renunciation be made by notarial deed en minute or by a judicial declaration which is recorded by the court. The spouse who renounces can therefore refer to a notary or the court. However, the legislature imposes other formalities which remove all doubts with respect to the renunciation. Not only must renunciation be made in the prescribed forms but article 1266u also requires that the renunciation be registered in the registry office where the conjugal domicile is situated within one year from the day of the dissolution of the regime.

Such renunciation duly registered has the effect stated in the first paragraph of article 1266v: "If a consort renounces, the share of his spouse's acquests to which he would have been entitled remains vested in the latter". Thus, the spouse who renounces gives up his right in the partition of the acquests of his spouse without affecting his spouse's right to demand the partition of the acquests of the renouncing consort.

We point out that registration is provided for so that renunciation may have effect with respect to third persons. A spouse who renounces could neglect to register his renunciation for another purpose. Indeed, article 1266x stipulates that "an acceptance or a renunciation once made is irrevocable". However, since the last paragraph of article 1266u presumes that the spouse who has not registered his renunciation within one year from the day of the dissolution is deemed to have accepted, a renouncing spouse could, after a hasty renunciation, not register his renunciation in order to be presumed to have accepted. Even in such a case, we do not think that the creditors could be prejudiced because, as we will see in the third section of this chapter, article 1267d grants recourses to the creditors even after partition.

141. In spite of the irrevocability of the renunciation, the second paragraph of article 1266v provides for a case where it can be annulled for the purpose of protecting the creditors. Indeed, if the creditors of the renouncing spouse prove that the renunciation made by him or his heirs was fraudulently made with respect to their rights, they may impugn the renunciation and accept it in their own right in lieu of the renouncing spouse. It is evident that the renunciation is not completely annulled in such cases. Because this article is intended to protect the rights of such creditors, it is annulled only in favour of these creditors and, naturally, to the extent of the amount of their claims.

This is another manifestation of the aspect of matrimonial regimes which relates to the protection of third parties. These regimes are first concerned with the patrimonial organization of the family, but such organization cannot be made to the detriment of third parties and especially to the detriment of creditors.

The code also had to provide for the option rights of the heirs and surviving spouse when the partnership of acquests is dissolved by the death of a spouse.

Paragraph III

Options when dissolution is caused by the death of a spouse

142. The legislature has provided for the case where the partnership of acquests is dissolved by the death of a spouse by regulating the option

rights of his heirs. It has also deemed it opportune to amend the regulation of *ab intestat* successions with respect to the options of the surviving spouse which we will study from the point of view of option rights at the time of the dissolution of the regime.

A. Rights of the heirs of the predeceased consort

143. Article 1266y grants the heirs of the deceased spouse the same rights which belonged to the spouse. They may accept or renounce the partition of the acquests of the surviving spouse according to the same forms and within the delays prescribed for their ancestor. Indeed, article 1266y stipulates that articles 1266r and 1266v apply to the heirs. At first, however, according to the reference made in article 1266y, the heirs are not subject to forced acceptance in cases of misappropriation or concealment of the acquests belonging to the surviving spouse nor to the penalty imposed by article 1266w. The draft prepared by the Revision Office also excluded the heirs from this article³⁷¹. The members of the Office gave no explanation in this regard. We could assume that, in certain cases, it would be difficult for the heirs to misappropriate or conceal acquests belonging to the surviving spouse, but this cannot be stated absolutely. This may be difficult, even impossible, when the heirs do not live in the family residence, but if the heirs are the children, the danger of misappropriating or concealing acquests belonging to the surviving spouse is the same as for the spouse. However, we think that article 1266y rules out this hypothesis in the case of heirs who, consequently, cannot be forced to accept the partition of acquests. Article 659 contains a provision similar to that of article 1266w applying to heirs; it is therefore possible, in the case of heirs, to arrive at the same solution by applying the rules governing successions, although it would have been preferable to include the heirs in article 1266w since the matrimonial regime must be liquidated before the succession is settled.

If all the heirs accept or renounce, the regime is dissolved as though the acceptance or renunciation had been made by the spouse. However, if some heirs accept and others renounce, the applicable rule is not that of successional accrual³⁷², but rather that established in article 1266v with respect to the spouse as well as the debtors. Indeed, the share of those who renounce will not increase that of those who accept, it will remain vested in the surviving spouse. If four heirs are involved, for example, together, they would all be entitled to half of the acquests belonging to the surviving spouse and each of them would be entitled to one fourth of this half. However, if only one heir accepts the partition of the acquests of the surviving spouse, he would only be entitled to his share, that is one fourth of half of these acquests and the three other fourths would remain vested in the surviving spouse.

Article 1266y also provides for the case where one of the spouses dies still having the right to renounce. In such case, his heirs have a further delay of a year from the date of the death in which to register their renunciation.

B. The rights of the surviving spouse

144. We must refer briefly to the regulation of *ab intestat* successions in order to specifically determine the rights of the surviving spouse with respect to an *ab intestat* succession under the partnership of acquests.

At the time of the reform of matrimonial regimes, the legislature also amended article 624c of the *Civil Code* in order to extend its application to the partnership of acquests. This article had been included in the Code in 1915 when the *Pérodeau Act*³⁷³ considered the surviving spouse as a regular successor while requiring him to choose between assuming the quality of common as to property and that of heir. At the time of the last reform of matrimonial regimes, the members of the Revision Office also deemed it opportune to include the partnership of acquests in article 624c. Such inclusion was more the result of a concern for agreement between texts³⁷⁴ than the result of an elaborate study of the reasons for such a decision³⁷⁵. They considered that, at the time of the adoption of the *Pérodeau Act*, the legislature had established a legislative policy whereby the surviving spouse could not assume both the quality of heir and that of common as to property and that it was difficult, irrespective of the advisability of this policy today to change a policy in matters of succession at the time of a reform of matrimonial regimes³⁷⁶. It is unfortunate that such a legislative policy was maintained for it confuses matrimonial rights and successional rights which are undoubtedly similar but which should not be confused. It is difficult, however, to criticize the proposal made by the Revision Office in light of our present law respecting successions.

145. The surviving spouse must therefore choose between his rights in the partnership of acquests and his rights in the *ab intestat* succession. This is the choice required by the confusingly worded article 624c. This relatively simple choice has, however, given rise to divergent interpretations with respect to the expression "abandon all her rights in (. . .) the partnership of acquests" used in the article with regard to the wife, or "renouncing his rights in the partnership of acquests" with regard to the husband. The problem is not raised by this small difference in the wording of the text. The question is to define *the rights* of each spouse in the partnership of acquests for once these rights have been determined, we can establish precisely what he must renounce if he wishes to assume the quality of heir.

It has been maintained that the surviving spouse must renounce the participation of the acquests belonging to the *de cujus* in order to be entitled to the succession, thus identifying the partnership of acquests with the com-

munity of moveables and acquets and that, in addition, he must return his own acquets³⁷⁷. In our opinion, if we consider that the partnership of acquets is a community of property³⁷⁸, it is normal to reason in terms of a common mass to be divided and to state that a spouse under the partnership of acquets is *entitled*, economically, to half of the acquets belonging to his spouse and to all of his acquets. Thus, according to this interpretation, in order to assume the quality of heir, he must renounce the partition of the acquets belonging to the *de cujus* and “make a return” (expression used in article 624c in the case of the husband only under a community) of all his acquets. So far, the logic is indisputable although the premise seems false in our opinion. However, this logic begins to break down when we state that if the heirs of the *de cujus* renounce the partition of the acquets belonging to the surviving spouse, the latter may keep his acquets and still be entitled to the succession³⁷⁹. Therefore, the so-called return of the acquets belonging to the surviving spouse is only required when the heirs accept the partition of these acquets; if they renounce it, the surviving spouse may keep all of his acquets. Even on the basis of a complete identification of the partnership of acquets with the community of property, an identification which we reject, we cannot accept that the acquets belonging to the surviving spouse be considered as part of *his rights* in the partnership of acquets if the heirs accept partition but that if the heirs renounce it, they are no longer considered as part of *his rights* in the partnership. There must be a more certain way to define the spouses’ *rights* under the partnership of acquets.

146. In order to effectively define the spouses’ rights under the partnership of acquets, we must first not identify this regime with the community of property. Both of these regimes are, of course, based on the partition of property but, whereas the partnership of acquets adopts techniques of co-ordination between the spouses, the community of property adopts techniques of subordination of married women. The main difference between these two regimes relates to common property and single administration which are the central aspect of the techniques applied under the community but a nonexistent aspect under the partnership of acquets. Because of the difference in the techniques and especially because of this aspect, the rights of the spouses in each of these regimes are not identical. We must therefore attempt to define the spouses’ rights with respect to partition under the partnership of acquets.

Let us first examine articles 1266s and 1267c. The second paragraph of article 1266s states that each spouse has the *option* of accepting or renouncing the partition of the acquets of his spouse, and the first paragraph of article 1267c establishes that “the mass of acquets is divided in half between the spouses, or their successors”. We point out that the expression “mass of acquets” used in this article only means the mass of acquets of each spouse and not a mass similar to the common mass³⁸⁰. Thus, *the rights* of each spouse are limited to accepting or renouncing half of the acquets belonging to his spouse. The right in the acquets of each spouse

thus belongs to his spouse or successors. Therefore, in order for the surviving spouse to be entitled to the succession of his deceased spouse, he must, according to article 624c, only renounce the partition of the acquests belonging to the *de cujus*. Furthermore, according to article 1266y, the heirs may always accept or renounce the partition of the acquests belonging to the surviving spouse, but the latter is not entitled to such an option³⁸¹. Considering this double and parallel option—that of the surviving spouse and that of the heirs—, the rules governing *ab intestat* successions apply.

Of course, article 624c also requires that the surviving spouse renounce and return to the mass all the advantages conferred on him by marriage contract or even by law, in the wife's case, as well as all proceeds of life insurance contracted in his favour by the *de cujus*, advantages which all differ from the rights conferred on the surviving spouse by his matrimonial regime.

147. If the spouses or heirs choose to renounce the partition of the acquests belonging to the spouse or their ancestor's spouse, our study of the partnership of acquests could be over since liquidation will not take place. However, if they accept the partition of the acquests or if one of them accepts it, we must then undertake the study of the liquidation of the partnership of acquests in order to finally examine the partition of the acquests of both spouses or the partition of the acquests belonging to the spouse of the spouse who accepts.

Section 3

Liquidation of the partnership of acquests

148. The liquidation of the partnership of acquests is aimed at establishing a double balance between the spouses: first, a static balance in order to permit each spouse to keep his private property, and then a dynamic balance in order to permit each spouse to benefit from the growth of his spouse's patrimony of acquests. However, the static balance which may have been destroyed during the regime must be reestablished after partition has been accepted before establishing the dynamic balance.

Paragraph I

Reestablishment of static balance between the patrimony of each consort

149. The first step in reestablishing static balance after acceptance is to form two masses: one made up of private property, and the other of acquests.

As soon as one spouse, or his heirs, accepts the partition of the acquests belonging to his spouse, the private property and acquests belonging to the latter must be distinguished. It is at that time that the important regulation respecting the designation of property as well as the general presumption of acquests and the presumption of acquests held in undivided ownership are applied. When an inventory was made before the marriage, the articles of the *Civil Code* providing for the designation of property are very helpful in interpreting it; however, when no inventory was made, these articles become indispensable in the establishment of the two masses of the consort whose acquests are to be divided after acceptance by his spouse. Once this operation is completed, a statement of compensation must be prepared.

A. Statement of compensation

150. Articles 1267 and 1267a indicate the criteria and applications of the theory of compensation under the partnership of acquests. Articles 1266f, 1266g, 1266j and 1266o which provide for the possibility of compensation must also be taken into consideration in preparing this statement.

The basic criterion established by the Code is that of the *enrichment* of one mass at the expense of the other. According to article 1267, a statement of compensation must be prepared for each spouse in order to determine what compensation is owed by the acquests in favour of the private property and vice versa. Again, we repeat that such compensation is calculated with respect to enrichment. The Code does not consider the impoverishment of the mass of assets, it only considers the enrichment of the mass of liabilities. Such enrichment, according to the second paragraph of this article, is valued as of the day of the dissolution of the regime but compensation must never exceed the expenditure actually made.

Since the legislature applies a unilateral criterion based on enrichment at the time of dissolution, there will therefore be cases where compensation will not be owed in spite of the impoverishment of the mass. Indeed, according to this criterion, if property acquired with private property and acquests has completely disappeared, the patrimony which might have required compensation because of its impoverishment will receive nothing since the patrimony owing in theory is not enriched at the time of the dissolution. It seems that the legislature intended to exclude from the statement of compensation cases where, due to the complete destruction of the property prior to dissolution, the impoverishment is supported proportionally by both patrimonies, even if we arrive at this solution by way of the valuation of enrichment at the time of dissolution. However, because the criterion considers only enrichment at the time of dissolution, any other enrichment must be disregarded as impoverishment must also be disregarded.

If, for example, an annex is made to private property out of the acquests and if this annex has no value at the time of dissolution, the acquests are not entitled to compensation even if they suffered impoverishment at the time of the construction of the annex. Indeed, if the impoverishment of the acquests does not correspond to an enrichment of the private property at the time of dissolution, the unilateral criterion established by the Code rules out compensation in favour of the acquests. From the viewpoint of legislative policy and for the purpose of avoiding complicated statements based on relatively hypothetical calculations at the time of partition, the legislature's choice may be justified. Indeed, we should stick to reality which can be evaluated without additional difficulties.

151. However, the unilateral criterion established by the legislature is accompanied by a limitation relating to the actual expenditure. According to the interpretation given to the second paragraph of article 1267, compensation can be less than the expenditure actually made if the property has depreciated at the time of the valuation of enrichment. However, the appreciation of the property does not make it possible for the impoverished patrimony to benefit from the increased value. Thus, because compensation is limited to the actual expenditure, any depreciation of property affects both patrimonies (creditor and debtor) proportionally. Still considering the criterion of valuation of enrichment at the time of dissolution, in the case of appreciation of property, it would have been logical for both patrimonies to proportionally benefit from the increased value of the property. In our opinion, this limitation to the actual expenditure seems to clearly favour the patrimony owing compensation at the expense of the patrimony to which compensation is owed.

We may question the criterion established by the legislature which disregards impoverishment in the calculation of compensation, but this criterion nevertheless makes it possible to prepare a statement of compensation from actual figures. It is more difficult to justify the criterion of limitation on compensation to the expenditure actually made in the case of appreciation of property, than to find reason for it. Indeed, we must not forget that the statement of compensation relates to the static balance between the patrimonies of the spouses, and that each consort is being allowed to restore a balance which may have been destroyed between his private property and his acquests on the basis of actual and effective enrichment at the time of dissolution. This enrichment may permit a compensation equivalent to the actual expenditure and the patrimony to which compensation is owed would then regain its static balance, or on the other hand, it may permit a compensation proportional to the depreciation suffered and the patrimony to which compensation is owed would then show a loss in relation to its condition prior to the transaction. The limitation criterion would be more understandable if compensation were always owed by the acquests in favour of the private property, for then, in accordance with the general regulation of the regime which tends to increase the property to be

divided, the acquests would always benefit from appreciations and could also proportionally share with the private property the loss incurred due to depreciation. As we have seen³⁸², however, articles 1266f, 1266g and 1266j hold a possibility of prejudice to the acquests by way of successive and well-calculated transactions and the private property could then benefit from the limitation criterion at the expense of the acquests.

Therefore, it would appear that the criteria established with respect to the evaluation of compensation will always benefit the debtor patrimony whether it is made up of private property or acquests. In addition to these criteria, the Code also establishes specific rules with regard to debts and certain expenditures.

152. Article 1267a establishes rules with respect to compensation in the cases of unpaid debts incurred for the benefit of private property, expenditures made for the maintenance and conservation of property, and in the case of payment of fines.

The first paragraph of article 1267a applies the enrichment criterion to debts incurred for the benefit of private property and calls for compensation by the private property in favour of the acquests presuming that such debts were paid out of the acquests. When preparing the statement of compensation, the debts incurred by the private property are transferred to the acquests' liabilities while requiring compensation according to enrichment. This is the legislature's solution to the problems which might have arisen after partition with respect to creditors. Indeed, there should be no more questions raised as to what property effectively paid such debts since they were shown in the statement of compensation.

On the other hand, the second paragraph of article 1267a also mentions expenditures made for the maintenance and conservation of property in order to exclude them from the statement of compensation. The nature of the property is of no importance with respect to such expenditures. Any expenditure made, whether it be made with private property or acquests, for the maintenance or conservation of property, whether such property be private property or acquests, does not give rise to compensation. This is a general and bilateral criterion. We point out that these expenditures are usually made with acquests and that, even then, it is normal not to require compensation. Indeed, these expenditures are usually paid with the revenues of the property and such revenues are almost always acquests.

Furthermore, the last paragraph of article 1267a provides for the case where compensation is always due when acquests have been used. It is the case of the payment of fines incurred in virtue of any penal provision of the law. When such fines have been paid out of acquests, compensation is due to them. As article 1266i designated as private property compensation received as damages because of its personal character, the last paragraph of article 1267a requires that the private property pay the fines because they are due to personal behaviour.

The statement of compensation of the patrimony of each spouse will be made by applying all these criteria but the static balance must be reestablished by settling the compensation.

B. The settlement of compensation

153. Article 1267b regulates the settlement of compensation. The statement of compensation may show a balance in favour of acquests or in favour of private property. In the first case, the spouse who holds the patrimony, or the successors to his rights, must make a return to the mass for partition. He thus transfers private property to his acquests. This transfer may be made either in value or in kind. In the last case, it can be made by taking less from the acquests or by transferring private property to the acquests up to the amount of the compensation. The spouse who holds the patrimony decides the method of settlement of compensation and since the Code tends to facilitate both the settlement of compensation and, later, partition, we believe that the spouse who holds the patrimony may choose one method or combine two or even all three in order to settle the compensation owed by his private property to his acquests. Indeed, he can settle everything in value, a method which does not raise many problems because it is a matter of accounting. He can also transfer some private property to the acquests, thus covering part of what is due, and make up the difference by taking less or in value. These transactions, however, do not permit the spouse who holds the patrimony to turn an acquest into private property. He may turn private property into acquests when he settles the compensation out of his private property but the Code does not seem to have considered the opposite transaction.

On the other hand, the Code only provides for one method of settlement of compensation when the statement shows a balance in favour of private property: pretaking from the acquests up to the amount owed. We do not think that this provision prevents the settlement in value of compensation by the acquests in favour of the private property.

The settlement of compensation must establish a static balance between the private property and the acquests of each consort while determining the specific acquests of each spouse. A dynamic balance between the spouses' acquests can then be established.

Paragraph II

Establishment of a dynamic balance between the consorts' acquests

154. Once the settlement of compensation has been completed, it is time to liquidate the partnership of acquests by dividing the acquests of each

spouse if both have accepted partition, or by dividing the acquests of the spouse of the consort who accepts. This partition establishes a dynamic balance between the consorts' acquests thus acknowledging the right of each spouse to participate in the growth of his spouse's patrimony of acquests. The Code establishes the rights of the spouses and criteria for partition in article 1267c. It also confers rights upon the spouses' creditors before and after partition in article 1267d.

A. Rights of a consort to the partition of the acquests of his spouse

155. The first paragraph of article 1267c applies the right which had been conferred upon spouses by article 1266s, by stipulating that the acquests are divided in half between the spouses or their successors. It also entitles the spouse who holds the patrimony to be divided, to choose the method of partition. Indeed, he may choose between the application of the rules provided for partition between coheirs in the title Of Successions of the Code³⁸³, and total or partial partition in value. The legislature thus wanted to simplify the process of partition and it indicated in the explanatory notes of the act that "(...) partition itself may be made in value. Thus, this liquidation is really an accounting process which is much simpler than the liquidation of the traditional community"³⁸⁴. Considering the composition and nature of his acquests, the owner of the acquests decides whether he prefers to proceed by accounting or whether he deems it advisable to proceed with partition partly in kind and partly in value, or totally in kind. He may therefore choose from a number of possibilities allowing him to adopt the method of partition which best suits the special circumstances of the patrimony to be divided. In our opinion, this flexibility is an excellent characteristic of the rules of partition of the partnership of acquests and it will undoubtedly simplify all these operations as well as avoid the danger of being forced to sell certain property in order to pay off the spouse.

The right of the spouse who holds the patrimony, or rather that of his successors, to decide on the method of partition, is recognized when partition is brought about by the death or absence of the spouse who holds the patrimony.

156. Indeed, the second paragraph of article 1267c confers to the surviving or present spouse a right on certain specific property. He may thus "require, on payment in cash of any balance, that his share include such dwelling house, household furniture and industrial, agricultural or commercial establishment of a family nature", as long as such property form part of the acquests of the deceased or absent spouse.

With respect to this provision, the first draft prepared by the Revision Office indicated that “the second paragraph implies a reservation with respect to the dwelling house and property of a family nature when the dissolution of the regime is brought about by the death or absence of the consort who holds the patrimony. Such a reservation seemed necessary in order to protect family unity”³⁸⁵. This remark did not appear, however, in the explanatory notes of the draft submitted to the Government³⁸⁶ and in those of *Bill 10*³⁸⁷. We had criticized the overly restrictive application of this provision at the time of the discussion of the draft in Parliamentary Commission³⁸⁸.

The legislature’s intention to protect the family is just as commendable for its purpose as it is open to criticism for the overly restrictive application it gave to the provision. Indeed, this intention to “protect family unity” is only evident under the partnership of acquests when the dissolution of the regime is brought about by death or absence³⁸⁹ and the surviving or present spouse may only require that the house and other property of a family nature be included in his share when there is partition of acquests.

If family unity is to be preserved, we believe that it should be in all respects and not only with respect to the legal regime. Furthermore, why should such protection be limited to cases of death or absence? It seems that in order to avoid the difficulties which would arise if this protection were applied to the other much more complicated cases of dissolution, the Office preferred to consider only the situations which would involve the least number of problems to be solved³⁹⁰.

Finally, by limiting the application of the article to the property to be divided, the residence is not protected if it is the private property of one of the spouses. Furthermore, even if it forms part of the property to be divided, the house and the other property of a family nature may only be required if the surviving spouse accepts the partition of the acquests. Now, because of the choice he must make between half of the acquests of the *de cuius* and his share in the succession³⁹¹, the protection provided by the second paragraph of article 1267c may prove to be more of a penalty for the surviving spouse than protection for the family.

157. The third paragraph of article 1267c provides for the procedure to be followed in the event of disagreement on the evaluation of the property for the purpose of partition. When the parties fail to agree on the value of property forming part of the acquests to be divided, they must entrust such evaluation to experts of their choice. If they fail to agree on the choice of the experts, the parties may appeal to a judge of the Superior Court of the district of the conjugal domicile who will designate such experts. This provision is further evidence of the legislature’s concern for solving the many problems which may arise at the time of the partition of the acquests. Certain provisions such as the ones we are examining

have given rise to criticisms with respect to the complexity of the partnership of acquests because the articles relating to liquidation and partition point out the problems and their solutions. We must emphasize the fact that this regulation of the legal regime is one of its most valuable characteristics. Instead of concealing the problems or not mentioning them, the legislature was realistic enough to indicate that problems could arise. It was also wise enough to propose techniques for solution. In the same spirit it provided for the rights of creditors at the time of partition.

B. The rights of creditors

158. Article 1267d confers rights to creditors during the period between dissolution and partition and also after partition in order to fully protect their rights with respect to the patrimony of their debtor.

Thus, the first paragraph of this article stipulates that the dissolution cannot prejudice the recourse of anterior creditors against the whole of the patrimony of their debtor, even during the period between the date of dissolution and partition. During the regime, the creditors of each spouse had recourse against the patrimony (private property and acquests) of their debtor. This provision maintains this recourse for these creditors in spite of the dissolution. When they contracted prior to the date of dissolution, they may sue their debtor for the payment of their claims without the latter being able to claim that he has insufficient acquests or private property, according to the source of the debt, to pay for such debt. No such distinction is permitted with respect to creditors during the regime and it is also not permitted after dissolution.

The Code also grants recourse to the creditors after the partition of the acquests. The second paragraph of article 1267d stipulates that anterior creditors retain their recourse against the spouse who is their debtor or his successors after the partition. In addition, they are given a recourse against the spouse or the successors of the debtor's spouse although they may only sue to the extent of the benefit derived by their debtor's spouse. The legislature has thus intended to protect the creditors' recourse against the whole of the patrimony of their debtor. Because half of their debtor's acquests were turned over to his spouse at the time of partition, they may sue their debtor's spouse for the payment of their claims to the extent of the portion of their debtor's patrimony which was turned over to the other spouse. We must point out that the creditors may only take advantage of this recourse against their debtor's spouse when the debtor's patrimony is insufficient to pay their claims. For example, if the debtor renounces the partition of his spouse's acquests without defrauding his creditors (if there had been fraud, they could have availed themselves of the recourse provided for in article 1266w, para.

2), but his spouse accepts the partition of the acquests, the debtor's patrimony is reduced by half of his acquests, a half that creditors may claim from their debtor's spouse. On the other hand, if their debtor accepts the partition of the acquests belonging to his spouse and if the latter accepts the partition of the acquests belonging to the debtor, it may not be to the creditors' advantage to sue the spouse although they still have the right to do so. However, the creditors' recourse is limited to their debtor's patrimony if the spouse renounces the partition of the acquests belonging to the debtor for the latter would then be in possession of his entire patrimony.

159. When one of the spouses has been called upon to pay, in whole or in part, his debts or the debts of his spouse as a result of recourse by creditors after partition, the Code gives the spouse who has thus paid debts a right of recovery against the other spouse or his successors, at the end of the second paragraph of article 1267d. Such recovery, however, is only for one half of the sums thus paid. This last recourse which could be called the "swan song" of the partnership of acquests must be understood with respect to the provisions of the first paragraph of article 1267a by virtue of which all debts were included among the acquests subject to possible compensation in the case of debts incurred for the benefit of private property. Article 1267d establishes a kind of joint and several liability after partition for unpaid debts although each spouse is only bound to pay half of such debts. Because the debts were not paid for and because they may even not be claimable until after partition, it is normal for each spouse to have been given a right of recovery for one half of the amount he has been called upon to pay since the creditors were granted a recourse against the whole of the patrimony of their debtor as it existed at the time the debts were contracted.

Indeed, at the time the statement of compensation was prepared, the debts were included in the liabilities of the acquests with the possibility of compensation. The amounts entered for such debts also had to be divided like the other acquests and each consort received half of these amounts. Consequently, in order to maintain the dynamic balance created by partition, the spouse who paid a debt after partition must claim from his spouse the half the latter had received at the time of partition which had been theoretically assigned to that debt.

Conclusion of Chapter

160. A great number of mechanisms are set into motion, techniques applied and options exercised between the date of the dissolution of the partnership of acquests and the time when the partition and last recourses

are settled. Our first impression is one of exhausting complexity, but upon closer examination, we discover a comforting reality. It is impossible to proceed with the liquidation of a matrimonial regime or with any other liquidation involving persons, property and conflicting interests without coming up against difficulties. The merit of the Quebec legislation on the partnership of acquests is to have regulated such difficulties and attempted to solve them. This does not mean, of course, that there will be no difficulties and that any liquidation will be made easily, but we believe that the Code has the key to the solution of many problems. We should attempt to solve the problems which cannot be easily solved by virtue of a specific provision of the partnership of acquests by using creative imagination in order to find applicable norms in accordance with the general regulation of the regime rather than by slavishly following the solutions of the community. Not that we consider the solutions found for the community invalid, they are valid for the community but they may not be appropriate to the partnership of acquests.

Conclusion of title

161. We have studied the partnership of acquests under this title, from its beginning to partition and even beyond this partition as long as its rules still applied. We have criticized many of its provisions more because they were incomplete or because they did not have a wide application than because we disagreed with their objectives.

In our opinion, the partnership of acquests as a legal secondary regime is the regime which best corresponds to the purpose of marriage and the Quebec sociological context. It offers both the advantages of the techniques of cooperation between consorts and those of the partition of property limited to the property acquired during marriage. The absence of a primary regime may, however, reduce the effectiveness of the partnership of acquests between the date of the beginning of the regime and partition because, in that respect, its regulation is quite removed from daily family life. We also think that it is time to make major changes in the regulation of successions so that it may better correspond to the reality of our time.

In spite of the criticisms we have made, the partnership of acquests is still the best regime in our opinion and is therefore a very good choice as a legal regime. However, applying the principle of freedom of marriage covenants, the legislator has also regulated conventional regimes. Among the latter and within the regimes based on the partition of property, we must now analyze those which adopted techniques of subordination of married women.

TITLE II

REGIMES BASED ON THE PARTITION OF PROPERTY USING TECHNIQUES OF SUBORDINATION OF MARRIED WOMEN: THE CONVENTIONAL COMMUNITIES

162. Still applying the principle of autonomy with respect to the secondary regime and in order to facilitate the task of preparing marriage contracts, the legislature also regulated other regimes based on the partition of property: the conventional communities. These communities are themselves based on techniques of subordination of married women by applying the notions of common property and single administration of such property entrusted to the husband. The reforms made in 1931, 1964 and 1969 have, however, progressively reduced the husband's control over the common property and the private property of his wife. In spite of these reforms, the techniques applied by communities remain rooted in the old principle of incapacity of married women and thus entail a certain degree of subordination for married women. The reserved property is really only a palliative with respect to this incapacity even if, at present, it may result in an unbalanced situation in favour of the wife. The legislature has effectively attempted to correct the subordinate position of the wife by introducing in the communities techniques of coordination and balance between the spouses. However, because the techniques of the communities are rooted in the principle of incapacity of married women, these new coordination techniques are not always the most suitable for the communities and they even create great difficulties of interpretation.

In addition to these problems and in spite of the last reform, the regulation of the communities contains somewhat unrealistic legal concepts. With respect to designation of property, moveables and immoveables are treated differently still considering that the latter are the only property of value. Certain provisions also reflect the wish to retain property in the direct line of descent. Our evaluation of these matrimonial regimes is not based solely on these matters although they constitute difficult obstacles.

The Code attaches great importance to the regulation of the community of moveables and acquests which used to be the only legal regime in Quebec until July 1st., 1970. It also lists the principal clauses which may modify the community of moveables and acquests. We will study this community in the first chapter and the modifications contemplated by the Code in the second chapter. In the third chapter, we will examine an institution which applies to the partnership of acquests as well as to the communities in certain cases: the legal usufruct of the surviving spouse. However, we will not study the legal nature of the community³⁹².

Chapter I

The Community of Moveables and Acquests³⁹³

163. The community was the legal regime of Quebec until July 1st., 1970. It was already the object of many criticisms³⁹⁴ during the twenties and it has since been widely rejected, a rejection made evident at the time of the 1962 survey by a considerable increase in the number of contracts of separation of property³⁹⁵. Moreover, it does not appear to have increased its level of acceptance since the last reform. To our knowledge, people are now choosing between the partnership of acquests and the separation of property. However, because the community was the legal regime for over one hundred years, there are still a number of people in Quebec who are married under the community. This regime could disappear from our society in a single generation if the trend of disinterest for the community continues; however, it cannot be ignored in the meantime.

Indeed, all spouses married without a marriage contract before July 1st., 1970 are subject to the provisions governing the community which became conventional as of that date³⁹⁶ and these provisions may also apply to those who married with a contract if they adopted a community regime. Furthermore, in spite of the disinterest for it, the legislature has granted special status to the community among the conventional regimes. Indeed, according to the first paragraph of article 1268, it can be adopted by a simple declaration established by notarial deed en minute. This provision may be explained by the fact that the legislature had to maintain a complete regulation of the regime in the Code, and had to continue to provide for all the rules governing the former legal regime because the spouses married under this regime did not have a contract. Thus, this possibility of adopting the regime by a simple declaration could be considered not as a preference of the legislature, but rather as a recognition of the fact that a detailed contract is not necessary because of the regulation already contained in the Code.

We will use the same general divisions in our study of the community as the ones we used in examining the partnership of acquests: the composition of the community (section 1), the administration of the community (section 2) and the dissolution of the community (section 3). Furthermore, we will often simply refer the reader to the analyses made in our study of the partnership of acquests.

Section 1

Composition of the community

164. As opposed to the regulation of the partnership of acquests, that of the community includes not only the assets or property, but also the liabilities or debts.

Paragraph I

The assets of the community

165. Articles 1272 to 1279a of the Code provide the rules governing the assets of the community. They provide, on the one hand, the criteria excluding certain property from the common assets, when it is designated as private property, and on the other hand, the criteria including other property in these assets, in the case of common property. There is, however, another category of property under the community which consists of the reserved property and revenues derived from the private property of the wife which fall in the community under certain conditions while being common property by nature.

A. Property excluded from the common assets

166. It is the private property which is designated as such under the community according to criteria that are slightly different from those applied under the partnership of acquests. Indeed, because of the importance still attached to immoveables under the community, we must, in certain cases, proceed by analogy with respect to moveables. Furthermore, the standards of classification of private property under the community also imply the recognition of the importance of the line of descent and the wish to keep

property within the family descent. Therefore, as opposed to the relatively simple criteria established for the partnership of acquests where the generally applied criteria were the date on which the property was acquired, before or after the marriage, and the manner in which the property was acquired, by gratuitous title or for valuable consideration, under the community, in order to designate property, we must not only determine whether it was possessed before or after the marriage, but also whether it is moveable or immoveable property. Furthermore, in the case where the property was received by gratuitous title, we must also determine whether it was received from an ascendant or from some other person. The criteria of classification are therefore somewhat more complex and not any more clear as a result. Nevertheless, for the purpose of this study, as under the partnership of acquests, it is also possible to group private property into two categories: immutable private property and mutable private property. However, there is also another category of private property under the community, that of private property temporarily included in the common mass.

1. Immutable private property

167. It is private property that will remain private as long as it is not involved with common property of a value greater than its own at the time of a transaction. As under the partnership of acquests, such property may be studied according to its origin and according to its personal character.

(a) Property that is private because of its origin

168. Articles 1272, 1274, 1275, 1276 and 1277 contain provisions by virtue of which property may be designated as private property because of its origin. Such property consists of the immoveables possessed before the marriage, those received during the marriage by succession or an equivalent title, the immoveables received from ascendants by gratuitous title, those received by family arrangement as well as the product of mines and quarries in certain cases. Property received by gratuitous title with a stipulation of private ownership must also be included in this category.

169. *Immoveables possessed before the marriage.*—Since the community is one of *moveables* and acquests, the first sentence of article 1275 specifically excludes from the community the immoveables which the spouses possess before the day when the marriage is solemnized. It would have been preferable to use another expression than that of “the day when the marriage is solemnized” since the regime may begin on another date due to the mutability of marriage covenants.

The Code seeks to exclude from the community all immoveables possessed by the spouses at the time the regime takes effect as well as the immoveables acquired after such date by virtue of a pre-existing cause.

This may apply to adverse possession where the possession which avails for prescription began before the beginning of the regime and may also apply to conveyances effected under a condition precedent or subsequent before the beginning of the regime when the condition is met after that date³⁹⁷. We will see in our study of common property that certain immoveables acquired before the marriage may fall into the community.

170. *Immoveables received during the marriage by succession or an equivalent title.*—The Code stipulates at the end of the first paragraph of article 1275 that such property is excluded from the community, that is, it is the private property of the consort who received it. However, the meaning of the word “succession” used in this article has been questioned. We agree with Comtois³⁹⁸ and with most authors³⁹⁹ that the word “succession” used in article 1275 must be interpreted as referring only to *ab intestat* successions and that the equivalent title is only equivalent to *ab intestat* successions. This provision, in fact, makes an exception to the general rule set forth in article 1272,4, by virtue of which all immoveables acquired during the marriage fall into the community. It is therefore logical that article 1275 be interpreted restrictively. Moreover, such an interpretation makes the anachronistic character of this provision more evident. Indeed, it only attaches importance to immoveables and only to those which fall to the consorts by *ab intestat* succession, thus attempting to keep within the family descent the only property which once had value.

171. *Immoveables received from ascendants by gratuitous title.*—Article 1276 clarifies the expression “equivalent to succession” by listing such cases. They are dispositions by gratuitous title, gifts or legacies, of immoveables made by ascendants in favour of the consorts. This is another exceptional provision which must be interpreted restrictively. The only immoveables that will remain private property are those received from ascendants. However, still attempting to keep immoveables within the family descent, article 1276 stipulates that, save an express declaration to the contrary, the immoveable given or bequeathed is always the private property of the spouse entitled to inherit even if the gift or legacy was made to the spouse of the consort entitled to inherit or to both spouses. For example, the gift of an immoveable made by a father to his son-in-law or to both his son-in-law and daughter will be considered as made to his daughter as her private property as equivalent to succession, providing the deed of gift contains no express declaration excluding the provision of article 1276. The Code thus places an emphasis on the line of descent which is somewhat inconsistent with our law of successions the fundamental principle of which is the absolute freedom to bequeath, established in article 831. The Code requires an express declaration of intent from the ascendant so that the immoveables may be excluded from the private property of the consort entitled to inherit. The ascendant may nevertheless stipulate that the immoveable shall belong to his son-in-law as private property notwithstanding the provision of article 1276 or he may even stipulate that the immoveable shall

belong to the consorts as common property. However, in the absence of any such express provision, the immoveable given or bequeathed will always belong to the spouse entitled to inherit as private property⁴⁰⁰.

172. *Immoveables received by family arrangement.*—Article 1277 stipulates that the immoveable received by one of the spouses from his ascendants either in satisfaction of debts due to him or subject to the payment of the debts due by the donor is also excluded from the common assets and remains the private property of the spouse. In both these cases, however, the community may lose: in the case of satisfaction of debts, the debt settled by the immoveable will usually be a common debt whereas the immoveable will remain private property if it is received from an ascendant; similarly, in the case of a gift subject to the payment of the debts due by the donor, they will usually be paid out of the common property whereas the immoveable received from an ascendant will remain the private property of the spouse. This solution is explained by the notion of family arrangement or as being a kind of advancement⁴⁰¹; however, a spouse who thus receives an immoveable from an ascendant may not enrich himself at the expense of the community; article 1277 also provides for compensation or indemnity in such cases.

173. *The product of mines and quarries.*—Article 1274 of the Code lays down specific rules governing the product of mines and quarries. According to article 1272,3, the fruits and revenues arising from the spouses' private property are common property. However, we are concerned here with a product and the Code makes a distinction. If the mines or quarries are opened during the regime upon the private immoveable of one of the spouses, the product of such mines or quarries will be excluded from the community. Since such product progressively exhausts the property which is private, the product is also designated as private property. On the other hand, if the mine or quarry was already being worked before the regime took effect still upon the private immoveable of one of the spouses, the product of such mine or quarry will fall into the community. We point out that the property is exhausted just the same whether the mine is worked before or after the beginning of the regime. The legislature probably deemed that the operation of the mine or quarry could be a source of revenue when it was opened before the beginning of the regime. As indicated in the first paragraph of article 1274, it has merely applied the rules laid down concerning the usufruct of mines and quarries⁴⁰². Such products are therefore private or common property depending on the time of the start of operations.

174. *Property received by gratuitous title with a stipulation of private ownership.*—The provisions contained in article 1272,1 and in the third paragraph of article 1276 permit testators or donors to exclude from the community the property they are bequeathing or giving to a consort in the deed of disposition by gratuitous title. It is then a matter of respecting the intention of the testator or donor. Indeed, article 1272,1, expressly permits

this with respect to moveables thus received during the community whereas the third paragraph of article 1276 contains a similar provision with respect to immoveables. Property received by gratuitous title is, as a rule, common property under the community whereas such property is, as a rule, private property under the partnership of acquests. Indeed, except for immoveables received by *ab intestat* succession or by an equivalent title from ascendants and by family arrangements, property received by gratuitous title during the community will fall in the common mass save an express provision to the contrary made by the testator or donor. Property received by gratuitous title under the community can therefore be compared with the fruits and revenues arising from property thus received under the partnership of acquests.

(b) Property that is private because of its personal character

175. As opposed to the regulation of the partnership of acquests, that of the community does not list many categories of property that is private because of its personal character. The only property mentioned in the Code as private property is compensation received as damages⁴⁰³. However, doctrine and jurisprudence have examined the nature of property for personal use, allowances, copyrights and insurance. We will examine these in order to determine whether or not they should be included in the common assets.

176. *Compensation.*—Article 1279a is explicit in this regard: “Compensation received by a consort after the celebration of marriage as damages for injury, for personal wrongs or for bodily injuries, as well as the right to such compensation and the action consequent thereon, shall be individual property of the consort”. This is an almost literal reproduction of article 1266i. The only difference in the French wording of these articles is that article 1266i mentions “actions” in the plural whereas article 1279a mentions “action” in the singular. We do not think that this difference could give rise to problems of interpretation. Of course, as under the partnership of acquests, should the compensation be invested by the consorts, the fruits and revenues arising therefrom fall into the community.

177. *Items for personal use.*—There is no provision in the Code stipulating that such property may be designated as the private property of the spouses. However, article 1380, which regulates the rights of the wife who renounces the community, can be used as a guide. If we read articles 1379 and 1380 together, we should conclude that all items for personal use must fall into the community. Indeed, article 1379 provides that if the wife renounces, she “cannot claim any share in the property of the community, not even in the moveable property she herself brought into it”. However, article 1380 makes a reservation and permits her to “retain the wearing apparel and linen in use, for her own person, exclusive of all other jewelry than her wedding presents”. This provision has reduced the severity of the old law⁴⁰⁴ under which the reasons for such an exception had more to do with modesty than with the recognition of the wife’s right to her wearing

apparel and linen. It has been said, however, that "Certain articles which have only a personal or sentimental value are excluded from the community, articles such as letters or family papers, portraits, etc. Furthermore, clothing, jewelry and the working tools for the personal use of a consort must not be included in the community"⁴⁰⁵. In our opinion, several of these items cannot be designated as private property. In spite of the absence of an express provision, we believe that letters and family papers, portraits, decorations, diplomas and, possibly, clothing may be considered today as private property by analogy with article 1266e,4, which could serve as a guide. However, we do not think that the same can be said for jewelry and working tools⁴⁰⁶, with the probable exception of jewelry considered as family heirlooms. The personal character of these articles is not as strong as that of the first group and furthermore, they may have a significant economic value. We are somewhat surprised that the legislature did not deem it advisable to include an article specifying this category of common property at the time of the last reform.

178. *Allowances*.—The Code does not expressly regulate the designation of property deriving from retirement pensions, disability allowances or other benefits of the same nature. Some authors have maintained that such allowances were excluded from the community and thus remained the private property of the spouse receiving them because they were established *intuitu personae*⁴⁰⁷. The Superior Court has previously held that compensation awarded by virtue of the *Workmen's Compensation Act* did not fall into the community because of its inalienability and immunity from attachment⁴⁰⁸, although, in the case of compensation received as damages, article 1279a now expressly settles the question in the same manner. With respect to retirement pensions, however, two recent decisions of the Superior Court seem to arrive at contradictory conclusions⁴⁰⁹. Both cases involved the partition of common property as a result of separation from bed and board, which was followed by divorce in the *Lemster* case. The dispute in both cases related to the designation of the sums accumulated by the husband by his contributions to his employer's pension plan which was the same in both cases. These cases are almost identical and yet the property seems to be designated differently at first sight. Indeed, in the *Lemster* case, the judge wrote *obiter dictum*: "Although the question is not before the Court, the undersigned judge concludes that this pension cannot form part of the common property and thus is the private property of the husband"⁴¹⁰. On the other hand, in the *Bilodeau* case, the judgment reads as follows: "... the Court... finds that the pension fund accumulated in the Canadian Pacific Company by the plaintiff forms part of the assets of the community..."⁴¹¹. We point out that the decision in the *Lemster* case achieves the same effect as that of the *Bilodeau* case although it is based on the theory of compensation without referring to the articles in the Code which provide for it⁴¹². Thus, the judgment states: "... the Court... finds that the defendant must return

into the mass for partition the sum contributed by him from his salary to the Canadian Pacific retirement plan . . .”⁴¹³.

Each of the judges relied on different criteria in designating the property and arriving at his judgment. In the *Lemster* case, the judge was mainly concerned with the inalienable nature and personal character of the pension in designating it as private property, although, because it was paid out of the husband's salary, which is part of the common property, the judge required that a return be made to the community as compensation. In the *Bilodeau* case, on the other hand, the judge was concerned with the nature of the property which was used to pay the pension, and since it is common property, he concluded that the pension was common property. In both cases, therefore, the sums used to pay the pension are returned to the mass for partition although by different legal means. However, the reasoning based on the theory of compensation in the *Lemster* decision was criticized⁴¹⁴, on the basis of the French theory that net salary is common property⁴¹⁵.

One thing seems clear, namely that the legislature ought to have provided a solution to this much-debated question at the time of the last reform of matrimonial regimes. Nevertheless, we feel it is justifiable in this regard to apply, by analogy, article 1266h which provides for the same matters under the partnership of acquests⁴¹⁶. Indeed, irrespective of the matrimonial regime of their beneficiary, such pensions are always of this inalienable nature, and are always established *intuitu personae*. Furthermore, under the partnership of acquests as well as under the community, they will be formed from the property to be divided. Therefore, we feel that, in conformity with the solution adopted by the legislature under the partnership of acquests, the right to such allowances and the capital should always be considered as private property under the community, but payments received during the regime should be considered as common property, even if such payments consist of capital and interest. However, no compensation would be owed to the community by reason of sums or premiums paid out of the common property⁴¹⁷.

179. *Insurance*.—Since the *Husbands and Parents Life Insurance Act* came into effect⁴¹⁸, doctrine⁴¹⁹ and jurisprudence⁴²⁰ seem to be unanimous in designating the proceeds of such policies as common property, if the policy is payable to whoever purchases it or his heirs and successors, and as private property if the beneficiary is specifically designated. In the last case, when the insurance falls within the scope of this statute, article 31 expressly excludes the proceeds of the policy from the community. In the final analysis, this is the same solution as that adopted by the legislature under the partnership of acquests. It would also be possible to apply, by analogy, the criteria adopted by the legislature with respect to compensation under the partnership of acquests. If the policy is payable to the spouse or the children, premiums paid out of the common property will not give rise to compensation. On the other hand, if the designated beneficiary is a third party and the premiums were paid out of the common property, compensation would

be due. Furthermore, if the beneficiary is designated generically—heirs, successors—we do not feel that compensation is due because even if the beneficiary of the policy may bequeath it by will, the proceeds of such a policy being common property, he may only bequeath half, the community retaining the other half.

Thus personal character remains the criterion of designation of this kind of property.

180. *Intellectual and industrial property rights.*—In the absence of specific provisions and judicial decisions, doctrine had suggested the same solution for the community⁴²¹ as that adopted by the legislature for the partnership of acquests. We feel that this solution is appropriate, for in effect it is the right that is of a personal nature in this respect, while the fruits and revenues, once the author has decided to exploit the commercial potential of his work, become part of the community like the fruits and revenues arising from other property. Reference should however be made to our comments on this matter in our study of the partnership of acquests⁴²².

181. It is unfortunate that the legislature has not deemed it advisable to include provisions specifying the private nature of certain property in the regulation of the community. The regulation of the community with respect to immutable private property reveals a clear disproportion between the consideration given by the legislature to private property due to its origin and to private property due to its personal character. In the first category, the regulatory provisions are detailed and complex, while in the second category there is practically no regulation. This is particularly unfortunate as it would have been a simple exercise, for the legislature could have adopted the same solutions as under the partnership of acquests, solutions which, in certain cases, had already been adopted by the courts or suggested by doctrine. Nevertheless, as under the partnership of acquests, immutable private property can, for the most part, become common property if it can be considered as mutable private property.

2. Mutable private property

182. Within the framework of our study of mutable private property, we must examine the cases of real substitution provided for in the Code: real substitution in the case of exchange, that which may occur in a case of co-ownership, and that resulting from replacement of property due to the alienation of private property temporarily included in the community. The Code provides for these cases in articles 1278, 1279 and 1305.

(a) Real substitution in cases of exchange

183. Before the last reform of matrimonial regimes, authors were discussing the question of the nature of property acquired in exchange for

private property, when the difference owed to the community exceeded the value of the private property⁴²³. We do not feel that it would be worth restating these discussions since article 1278 was amended at the time of the last reform (along with article 1279) and since it now provides in this case for the solution formerly rejected by most jurists⁴²⁴.

Article 1278 now provides that immoveables acquired during marriage in exchange for private immoveables are substituted for the latter, but the community is entitled to compensation if a difference has been paid. However, if the difference is greater than half the value of the property acquired in exchange, such property becomes common property subject to compensation in favour of the private property.

The decisions of our courts indicate that this article should be given a restrictive interpretation: that is, the contract concluded must in fact have been an exchange⁴²⁵. If some other kind of contract is involved, the property so acquired may not be considered as private property. Nevertheless, a consort who owns a private immovable may, at any time while the community is in effect, make a replacement for the value of that property, and if the replacement is made in accordance with the formal requirements of the Code, which we will examine further on, the property thus acquired will become private property. Furthermore, even if there was no exchange at the time of the transaction, nor subsequent replacement, the private property of the spouse will not be diminished thereby, since he may always recover the value of the property by way of pretaking at the time of the dissolution. If, under the existing provisions of the Code, the property becomes common property at the time of an exchange because the difference is greater than half the value of the property acquired, we feel that the spouse who owns the private property may regain the value of such property by way of replacement at any time during the community.

Moreover, this article mentions only immoveables and we wonder whether moveables are excluded from any real substitution under the community. Relying on the interpretation of Pothier⁴²⁶, doctrine suggests that the principle of article 1278 also applies to private moveable property⁴²⁷. This appears to be an acceptable interpretation, although the wording of the article can also lead to the exclusion of private moveable property. It is yet another instance of the disproportionate emphasis placed on immoveables by the Code. Shortly after the Code was drafted, Mignault criticized the value judgment against moveables made therein⁴²⁸, and this criticism was also made by Comtois shortly before the 1964 reform⁴²⁹. It is, however, very surprising that the 1969 reform took no action to correct this situation, particularly in view of the fact that Comtois was chairman of the committee making the reform proposals. Was this done to preserve remnants of a bygone age in our positive law? In any event, the most elementary justice requires that the principle of real substitution apply equally to moveables and immoveables.

(b) Real substitution in cases of co-ownership

184. Article 1279 also regulates real substitution, but when the private property is an undivided portion of a jointly owned immovable. The same rule is here being applied to another case. The new portion thus acquired will become private property along with the old portion if the value of the new portion is equal to or less than that of the old portion, or the whole will fall into the community if the new portion has a value greater than the old one and was acquired with community assets. Of course, this is all subject to compensation in favour of the community or the private property as the case may be.

(c) Real substitution in cases of replacement

185. Article 1305 of the Code provides for a general possibility of real substitution under certain conditions. It should first be noted that although the article refers only to immovables—revealing again this anachronistic prejudice—the writings of Pothier may also serve as a guide in this area: “for since this characteristic of *community property* is one which may apply equally to moveables and immovables, it passes from my patrimony at the price I sold it”⁴³⁰. This is the case of replacement described by Mignault as “the replacement of one private asset by another”⁴³¹. Thus, when property is acquired during the community, and when the spouse states at the time of acquisition that it is made with moneys arising from the sale of private property, or for the purpose of replacing the latter, the new asset will be private property. However, either of these statements must be made at the time the new property is acquired: if the spouse neglects to do so, the new property will be an acquêt even though it was acquired with private property⁴³². Furthermore, according to the wording of article 1305, it does not seem necessary to make the statement in the same deed of acquisition⁴³³, though proof will be facilitated in the statement of replacement forms part of the deed.

At the time of the last reform, the legislature repealed old article 1306, which specified different formal requirements with respect to the replacement of private property belonging to the wife. Henceforth, replacement is perfect as regards both the husband's and the wife's private property⁴³⁴ when the statement is made at the time of acquisition.

However, the new article 1305 did not expressly settle the question of the nature of property acquired by way of replacement when common property was used in addition to moneys arising from private property. Authors put forward several solutions in such cases, similar to those they had adopted in the case of an exchange⁴³⁵. In our opinion, we should now adopt solutions similar to those of articles 1278 and 1279 and treat the value of property acquired in replacement and that of private property involved in the transaction in the following manner: if the value of the private property is equal to or greater than half the value of the property

acquired, the latter will be private property subject to compensation in favour of the community; on the other hand, if the value of the common property is greater than half the value of the property acquired in replacement, the latter will be common property subject to compensation in favour of the private property of the spouse.

186. Thus, the technique of real substitution will make it possible to preserve the private nature of property; however, if common property is involved in the transaction, the same technique may make it possible for the new property to be considered as common property, depending on the value of the property used. Of course, both cases may give rise to compensation in order to maintain the balance between the private patrimonies and the common mass. However, because of this common mass and the enjoyment of all property by the community, at least in principle, in addition to the two categories of private property found under the partnership of acquests, we find a third category under the community, that of private property temporarily included in the community, also known as imperfect private property.

3. Private property temporarily included in the community

187. This category of private property has lost importance since the last reforms. In fact, private property temporarily included in the community consists of the consumable private property of each spouse which was formerly administered by the husband. The latter, as the administrator of the community, had the enjoyment of this property; this enjoyment—a kind of usufruct—by the community of the consorts' private property, was transformed in the case of consumable property into a kind of quasi-usufruct. Thus, the community in such cases became the owner of consumable property even though the technical owner, the consort, retained a claim against the community allowing him to pretake other assets of comparable quantity, quality and value, or their estimated value⁴³⁶ at the end of the regime.

However, since 1964, the husband no longer administers the private property of his wife,⁴³⁷ and since 1970, the wife may not only administer but also freely dispose of her private property⁴³⁸. Thus, the private property of the wife will normally be excluded from possible temporary inclusion in the community, since there will be no possibility of physical confusion of her private consumable property with the common property. However, we do not think that private property temporarily included in the community, or imperfect private property, has completely disappeared from our law as a result⁴³⁹. In fact, the husband's private property may be temporarily included in the community. An agreement may even provide that the wife's private property can temporarily be included in the community.

Article 1303 provides for such situations. It stipulates that, if the selling price of a private object or if a private object falls into the community,

the spouse—owner of the object may invest this price or the value of the object at the time of a subsequent replacement. However, if no replacement is made, he has a right to pretake the price or the value of the object at the time of dissolution. We point out that even though the article refers only to the sale of property, it has been concluded that the possibility of replacement or pretaking existed in all cases of conveyances¹⁴⁰. However, since these assets are consumable, it is always possible that proof of their nature will be difficult, even impossible to make since the presumption of joint acquiescence established in article 1273 may apply. Thus, such consumable private property temporarily included in the community could become common property because of difficulties of proof and because of the presumption, and could thus increase the mass for partition.

188. Thus, private property may, as under the partnership of acquiescence, change nature either because it is involved in a transaction with common property of a value greater than its own, or because the presumption of joint acquiescence applies for lack of evidence. Nevertheless, the private property of a spouse will not normally be diminished in the first case, since he will be entitled to compensation which may be obtained in the form of pretakings or reprises. In the second case, the community will gain without compensation being owed to the private property. However, the Code is more explicit in determining the property that will be included in the community.

B. Property included in the community

189. The Code includes several categories of property in the community but as the moveable or immovable nature of the property retains great importance under the community, we will study common property under these two headings; careful consideration should however be given to the presumption of joint acquiescence, consistent with the presumption of acquiescence we have studied under the partnership of acquiescence.

1. Moveables

190. For the purposes of our study, we will divide the study of moveable property into two categories: moveable property on the one hand, and proceeds, fruits and revenues on the other hand. In spite of their common moveable nature, the regulation of these two categories is not identical.

(a) Moveable property

191. Article 1272,1, designates three groups of moveable property as common property: 1) those which the spouses possess on the day the marriage is solemnized; 2) those they acquire for valuable consideration during the

marriage; and 3) those they receive by gratuitous title during the marriage, unless the donor or testator has provided otherwise. Each of these groups is justified in a different manner.

192. *Moveables possessed before the marriage.*—It may be noted in passing that article 1272,1, should have referred to the moveables possessed before the regime rather than before the marriage, considering the present principle of mutability.

Since the community is one of *moveables* and *acquests*, it is logical that the moveable property possessed by the spouses before the beginning of the regime be considered as common property. It should be noted, however, that an obsolete value judgment regarding moveables is thereby perpetuated⁴¹. Nevertheless, any moveable property, whatever its nature, possessed by either spouse before the beginning of the regime will fall into the community. This will also apply to moveable property as well as claims—with the rare exception of claims on immoveable property—and securities⁴². Any property or right designated by the Code as moveable⁴³ will fall into the community if it is possessed by the spouses before the beginning of the regime. We do not feel it necessary to list such property at this point.

193. *Moveables acquired for valuable consideration during the marriage.*—The reasoning underlying this category of common property is also to be found in the composition of the community, though in this instance the term “acquests” is what brings it into the community. Thus, in principle, all moveable property acquired by the spouses for valuable consideration during the marriage will always be common property.

194. *Moveables received by gratuitous title during the marriage.*—The Code also provides that all moveable property received by the spouses during the marriage by succession, legacy or gift, as well as the fruits and revenues arising therefrom are common property, unless the donor or testator expressly provides otherwise. The reasoning here is the same as in the preceding cases: all moveables acquired during the marriage, by onerous as well as by gratuitous title, are common property. There is thus an important distinction between this and the partnership of acquests in which property received by gratuitous title remained private. However, the legislature respects the wishes of the donor or testator, when expressed, and if the donor or testator indicates explicitly or implicitly, that the property, or the property and its fruits and revenues, are to remain the private property of the beneficiary of the gift, they will be excluded from the community. In the absence of any such provision, however, moveables will be common property.

(b) Proceeds, fruits and revenues

195. Article 1272,2, designates the proceeds of the spouses' work and paragraph 3 of the same article designates the fruits and revenues arising from the property of the spouses. Furthermore, a specific provision is made in article 1274,2, for the product of mines and quarries.

196. *The proceeds of the spouses' work.*—The proceeds of the spouses' work are typical *acquêts*, and as the community is one of moveables and *acquêts*, it is logical that they fall into the community. However, article 1272,1 stipulates that they are common property subject to the provisions relating to reserved property⁴⁴⁴. The Code was of course amended in 1931 to include a chapter on reserved property, a chapter which was amended several times in subsequent reforms. This reform was largely brought about by the abuses of some husbands, who were at that time lords and masters of the community; wages earned by wives under the community were entirely beyond their control, the husband being the only one with power to dispose of such earnings⁴⁴⁵. Consequently, according to the present regulation, only the proceeds of the husband's work are included of right in the community. The proceeds of the wife's work, while being common property by nature, constitute her reserved patrimony of which she has the administration, enjoyment and free disposal, in spite of certain limitations which we shall examine further on⁴⁴⁶. Thus, in order to palliate the difficulties raised by the techniques of common property and single administration applied under the community, this separate patrimony was established and made up of property that is common by nature but that may be excluded from the partition of property, as we will see further on⁴⁴⁷.

197. *Fruits and revenues arising from all property.*—Article 1272,3 designates as common property the fruits and revenues which fall due or are received during the marriage, arising from property remaining private to the spouses. Here again, however, designation is made subject to the provisions of article 1297. The situation created by the Code is somewhat comparable to that of the proceeds of work. Indeed, the fruits and revenues arising from the husband's private property will of right fall into the community. On the other hand, article 1297 gives the wife the right to administer and freely dispose of her private property, subject to turning over to the community, at her husband's request, the fruits received by her that remain unconsumed as well as the property acquired by investing such revenues. Thus, the fruits and revenues arising from the wife's private property will not of right fall into the community even though they are common property in principle. The question arises whether the legislature intended to alter the old rule according to which the revenues arising from the wife's private property were common property⁴⁴⁸, but we do not think that this was the case. In fact, the amendment of article 1297 by the legislature was intended more as a moderation of the subordination techniques in which the community has been maintained⁴⁴⁹; the legislature intended only to confer a greater degree of capacity on the wife. We shall see further on⁴⁵⁰ how the revenues arising from the wife's private property, which are common by nature, as indeed is the reserved property, may also be excluded from the property to be divided in spite of their nature.

198. *The product of mines and quarries opened before the marriage.*—We noted above, in reference to private property¹⁵¹, that according to article 1274, the product of mines and quarries, following in this regard the rules laid down with respect to usufruct, is private property if the mine or quarry was opened during the marriage, but that it is common property if operations began before the marriage. It does not appear necessary to review this question.

199. The situation respecting moveables may thus be summarized with the observation that, in principle, they are all common property. However, if they were received by gratuitous title before or during the marriage, they may be private property depending on the intent of the donor or testator. Furthermore, the legislature's wish to moderate the effect of the subordination techniques has meant that the proceeds, fruits and revenues are treated differently depending on whether they fall into the community as a result of the husband's or the wife's property. In the latter case, the common nature of the property does not seem to have been changed, but the techniques introduced may result in excluding it from the partition. This statement seems paradoxical, and, in our opinion there is in fact a legal paradox here; nevertheless, it reflects the present situation of our law respecting moveables. Instead of fundamentally changing the subordination techniques under the community, the legislature has preferred to preserve them, in principle, and to introduce exceptions which may ultimately destroy the principle. We must now examine the immoveables included in the common assets.

2. Immoveable property

200. There are two categories of immoveable property included in the common assets: immoveables acquired before the marriage, but after the marriage contract, and immoveables acquired during the marriage.

(a) Immoveables acquired between the date of the contract and the date of the marriage

201. The second paragraph of article 1275 creates an exception to the rule stated in the first paragraph, by providing that the immoveables possessed before the day when the marriage is solemnized remain in the private property of their owner. The purpose of the exception is to include in the community the immoveables acquired between the date of the contract and the celebration of the marriage, except where such a purchase was provided for in the contract. The purpose of this provision is to prevent possible fraud. Indeed, a spouse could realize after signing the contract that his moveable property will fall into the community and could thus

purchase immoveable property in order to retain private ownership. In order to prevent such fraud, the legislature has provided that such immoveables will form part of the community.

(b) Immoveables acquired during the marriage

202. We will only examine immoveables acquired for valuable consideration under the provisions of article 1272,4, and those acquired by gratuitous title under article 1276, para. 3. We shall not re-examine the cases of real substitution, studied earlier⁴⁵², because since we are concerned with mutable private property, the contrary assumption includes such property in the community.

203. *Immoveables acquired for valuable consideration.*—It should be noted that, as under the partnership of acquests, immoveables acquired during the regime by virtue of a pre-existing cause are excluded from this category. Thus, if an immoveable is acquired by prescription during the regime, but the spouse began the possession which avails for prescription before the beginning of the regime, he became its owner by the retroactive effect of the prescription on the date he took possession, and was therefore owner before the beginning of the regime. Save the cases of pre-existing cause before the beginning of the regime, all other immoveables acquired for valuable consideration during the regime will be part of the community. However, a distinction must be made between immoveables acquired of right with common property and immoveables acquired with reserved property or revenues arising from the private property of the wife. In both these cases, the result of the different treatment applied to such property by the legislature will be that immoveables so acquired will also benefit from special treatment, and will be subject to rules that are different from those governing immoveables acquired with ordinary common property.

204. *Immoveables acquired by gratuitous title.*—In theory, it should not have been necessary to state in a specific provision that such property is common property since article 1272,4 is worded to include both acquisitions for valuable consideration and by gratuitous title. However, since the legislature had provided in articles 1275, para. 1 and 1276, paras. 1 and 2, that immoveables received by gratuitous title by succession or an equivalent title were private property, it felt it advisable to indicate in the third paragraph of article 1276 that all immoveables received by gratuitous title from persons other than ascendants are common property, unless they are specifically excluded from the community by the donor or testator. The Code thus reaffirms its preference for the family descent thereby departing from the rule laid down under the partnership of acquests according to which any property received by gratuitous title remains the private property of the beneficiary. It is not the method of acquisition (for valuable consideration or by gratuitous title) which determines the private or common nature of property under the community, but rather the classification of the property

as moveable or immovable, and in such case, its origin (from ascendants or other persons).

205. Immovables received by gratuitous title will therefore become part of the community as long as they are not received from ascendants and that no specific provision has been made by the donor or testator. On the other hand, immovables acquired for valuable consideration, although they are all common property in principle, may be completely excluded from the partition if they were purchased by the wife using her reserved property or revenues derived from her private property. However, as under the partnership of acquests, the legislature has not simply enacted a classification of the property, it has also established a presumption.

3. The presumption of joint acquest

206. Article 1273 establishes a general presumption of joint acquest, applicable to moveables as well as immovables. The former article 1273 referred only to immovables in establishing this presumption. However, the reform introduced in 1969 cannot be said to have altered our law, since even though the presumption appeared to apply only to immovables, the article was always interpreted as applying to moveables as well⁴⁵³. As under the partnership of acquests, this presumption tends to increase the mass for partition. Clearly, the presumption will be very useful with respect to moveables, and it may even allow the inclusion of moveables received by gratuitous title among the property to be divided where the clause specifying private ownership is not sufficiently clear. In cases of real substitution of immovables, the presumption will also be helpful in classifying immovables acquired during the marriage without a provision regarding replacement⁴⁵⁴.

207. Having examined the presumption of joint acquest, we have now completed our review of property included in the common assets. However, we have also indicated⁴⁵⁵ that certain property, common by nature, could be excluded from the common assets. We must now examine this property which will be included in the community only on certain conditions.

C. Property that may be included in the common assets

208. This applies to the reserved property and revenues arising from the wife's private property which, while being common by nature, receive special treatment and may only be included in the community at specified times and under certain conditions.

1. Reserved property of the wife under the community

209. Under this heading, we will only study the reserved property from the point of view of its possible inclusion in the community. From this point of view, two questions arise: a) when may it be included in the community? and b) under what conditions?

(a) The time of inclusion of reserved property

210. The first paragraph of article 1425f seems quite clear in this respect: the reserved property shall be included in the partition of the community. Thus, it is only at the time of partition that the reserved property may become common property, because during the regime, such property is administered only by the wife who has the enjoyment and free disposal of it⁴⁵⁶. However, it may be included in the partition of the community at the time of the dissolution of the regime, for despite the wording of the first paragraph of article 1425f, its inclusion in the community is subject to certain conditions.

(b) Condition for inclusion of reserved property

211. Only one condition exists, and it is easy to establish: acceptance of the community by the wife or her heirs. Thus, it is the wife or her heirs who will decide whether the reserved property will become common property, or whether it will be definitely excluded from the partition; this decision will be made taking into consideration the value of the community. Indeed, paragraph 2 of article 1425f allows the wife to keep her reserved property "free and clear of all debts other than those for which such property was liable under article 1425e" if she renounces the community. Consequently, the palliatives of the subordination techniques introduced in 1931 by the legislator may result in changing the very composition of the community in a unilateral manner. However, if the wife wishes to accept the community, she is obliged to return her reserved property to it, and the property will be included in the partition at that point, the legislature having laid down in the third paragraph of article 1425f the procedure to be followed in the event the wife disposes of the reserved property in fraud of her husband's rights.

2. Revenues arising from the private property of the wife under the community

212. Article 1297 provides: "The wife has the administration and free disposal of all her private property, but must, on the request of her husband, turn over to the community the revenues received by her that remain unconsumed, as well as any property acquired therewith." The principal question concerning this provision seems to be, when may the husband request this

property⁴⁵⁷? The enactment is quite clear as to the other matters: the husband may not request an accounting and may only request the revenues received that remain unconsumed or property acquired with such revenues. Obviously, this can have a considerable effect upon the common assets, for if the wife spends the revenues from her private property leaving no traces of investment, the husband can claim nothing if they have all been consumed. However, if the wife has not consumed all such revenues and if she has made investments, she must turn them over to the community at her husband's request. But when can such a request be made? On a day-to-day basis? Weekly? Monthly? Once a year? From time to time? At the end of the regime?

The explanatory notes of the statute give the reasons behind the extension of article 1297. They contain the following statement: "One final observation; the right to dispose of the revenues arising from her property conferred on the wife by the first paragraph will undoubtedly have been noted. It seemed necessary to grant her such right if she is to administer her private property effectively. Moreover, it would have been manifestly inappropriate to pretend to confer some independence on her, and at the same time require a thorough accounting for all the fruits received"⁴⁵⁸. According to this, it seems clear that the husband may not request from his wife the revenues derived from her private property on a day-to-day basis, nor even weekly or monthly. Furthermore, if that were the case, if the husband could request the revenues as they were received by his wife, article 1297 would not have conferred any right on the wife, and it would also be pointless to speak of fruits received and that remain unconsumed, since, on that assumption, the husband would not leave his wife time to consume them.

Consistent with the intent of this article, we believe that the husband may make such a request at the end of the regime, though this interpretation is not required by the provision. However, the revenues derived from the wife's private property may be likened to her reserved property. Both cases involve property that is common by nature, and in both cases, to palliate the subordination techniques, the legislature has provided for treatment different from that of ordinary common property. Since the reserved property remains in the wife's hands until partition, we feel that we could proceed by analogy, at least in general, and state that, in principle, the husband may make his request at the time of the dissolution of the regime. However, since this interpretation is not required by the article, we feel it is also acceptable for the husband to make this request to his wife when the need arises, in other words, when the property included in the assets administered by the husband cannot meet the liabilities of the community. However, we find it difficult to accept that the husband be allowed to request of his wife, at his discretion, the fruits derived from her private property received by her that remain unconsumed.

On the other hand, we do not feel that a wife is obliged to turn over to the community such fruits and revenues if no request is made by her husband. If the husband has made no request, and save the case of fraud

against the rights of creditors, we feel that article 1297 may be interpreted to mean that such property remains the private property of the wife.

213. As we have seen, the assets of the community conceal a number of problems. We feel these are largely due to their regulation which is still based on principles justifiable under the old law, but which are now incompatible with the evolution of our society. The complexity of the assets of the community should also be reflected in the regulation of the liabilities of the community.

Paragraph II

Liabilities of the community

214. The complexity of the assets of the community has its exact counterpart in that of the liabilities. Indeed, it has been said that a close correlation exists between the assets and the liabilities⁴⁵⁹, though it may be noted that this correlation is not absolutely perfect. Even if it can be said that, in principle, the rule *ubi emolumentum, ibi onus* is followed under the community⁴⁶⁰, there is nevertheless a certain degree of disproportion. Indeed, all moveable debts contracted before the regime usually fall into the community, whereas only the moveables possessed before the beginning of the regime will be included in the community. Since immoveable debts are practically nonexistent, there may well be a disproportion at the beginning of the regime between the property and the debts which fall into the community. However, it remains true to say that, ordinarily, there will be a perfect correlation between the assets and the liabilities, and that consequently, our study of the liabilities should encounter a degree of complexity similar to that of the assets.

Thus, we find concepts which, though quite different, may be likened to property that changes nature during the regime when involved in transactions. Naturally, where liabilities are concerned, besides the question of the nature of a debt, the question of the recourses available to creditors assumes considerable importance. We are thus led to consider the notions of provisional liabilities or debt liability, and final liabilities or contribution to debts. The regulation of the provisional liabilities provides basically for the recourse available to creditors against the existing patrimonies, whereas that of the final liabilities establishes which patrimony will in fact bear the debt, and from this point of view, the statutory provisions may be regarded as essentially regulating the economic relationships between the consorts. It should be noted, however, that debt liability (provisional liabilities) and contribution to debt (final liabilities) can sometimes be identical.

One final observation must be made before examining the liabilities. Since the community has no legal status separate from that of each spouse,

debts will always be contracted by one or the other spouse, even where they are of a “family” nature.

We should begin by considering the provisional liabilities, which will enable us to see the effect of liabilities during the regime, so that we may then analyse the final liabilities which usually settle the contribution to debts at the end of the regime.

A. Provisional liabilities

215. Articles 1290 to 1291c in general, and articles 1284 and 1285 as they relate to debts on property received by gratuitous title, give the rules to be followed by creditors in the exercise of their recourses. The aim is to facilitate the exercise of such recourses by allowing creditors to proceed against two or more of the existing patrimonies. In fact, depending on the circumstances, they may sue for the payment of their claims against the private property, the common property or the reserved property. However, the patrimony against which recourse is taken depends on which spouse contracted the debt, for the recourse is different depending on whether the debt is attributable to the husband or the wife. The patrimonies involved in the debt liability will of course be different also, when the debts were contracted by the consorts jointly or severally. Finally, the Code also provides for pecuniary condemnations in article 1294.

To facilitate our study, it should be noted at once that, when during the regime, the community becomes liable for a debt attributable to one of the consorts only, the first paragraph of article 1291b provides that the payment of such debt cannot be claimed against the private property of the debtor's spouse. Therefore, in considering debts attributable to the husband or the wife, we must remember that the private property of the debtor's spouse may never be claimed by creditors. However, as we will see in our study of debts attributable to both spouses, the provision just noted will not apply.

1. Debts attributable to the husband

216. In order to examine the recourses available to creditors in cases where the debts are attributable to the husband, a distinction must be made between debts contracted by the husband, provided for in the first paragraph of article 1290, and debts contracted by the wife in virtue of a general or special power of attorney from her husband, provided for in article 1291. We must also examine provisional liabilities in the case of debts resulting from successions regulated by article 1284 and the first paragraph of article 1285.

(a) Debts contracted by the husband

217. In the case of debts contracted by the husband, the regulation respecting the recourse available to creditors is quite simple. The first paragraph of article 1290 provides that payment of debts contracted by the husband during the marriage may be claimed against the husband's private property and the property of the community, to the exclusion of the reserved property. However, this exclusion of reserved property, in the case of debts contracted by the husband must be considered with respect to the second paragraph of article 1425e which gives the husband's creditors the right to proceed for the payment of their claims against the reserved property when such debts were contracted in the interest of the household.

Generally speaking, therefore, the husband's creditors may always proceed for the payment of their claims against the husband's private property and against the ordinary common property excluding the reserved property. However, if the debt is one contracted in the interest of the household, the provisions relating to reserved property state that, in such case, the husband's creditors also have a right to proceed against the reserved property.

(b) Debts contracted by the wife in virtue of a general or special power of attorney

218. Article 1291 regulates debts contracted by the wife that are not attributable to her but to her husband. The article provides that, when a wife contracts a debt as her husband's mandatary, the general rule of mandate applies and the debt is attributable to the husband. The wording of the article suggests an analogy with the legal mandate, since it mentions a general power of attorney, and with conventional mandates, since it mentions a special power of attorney. In either case, the debt is attributable to the husband. The article also provides that, in such cases, creditors cannot sue for their payment neither against the wife nor against her private or reserved property. However, the second paragraph of article 1425e also modifies the provision of article 1291 in the case of debts contracted by the wife by virtue of a general or special power of attorney from her husband if the debts thus contracted by the wife are done so in the interest of the household. In such case, the husband's creditors may also proceed against the reserved property.

As in the case of debts contracted by the husband, creditors may proceed, for the payment of debts contracted by the wife by virtue of a general or special power of attorney, against the husband's private property and against the common property, to the exclusion of the reserved property. However, if these debts are contracted in the interest of the household, their recourse may also extend to the reserved property.

Thus, in the case of debts attributable to the husband, the provisional liabilities are established in the same manner when the debt is contracted by the husband as when it is contracted by the wife as her husband's mandatary.

(c) Debts of successions falling to the husband

219. We must consider here the regulation respecting the provisional liabilities in all cases of debts associated with property received gratuitously by the husband whether by succession, gift or legacy. The regulation is the same in all these cases for, even though article 1284 and the first paragraph of 1285 mention only successions, article 1289, providing for gifts and legacies, refers to the regulation of the debts of successions. For the sake of brevity, we will use the word "succession" in this paragraph to refer to all property received by gratuitous title.

It may be noted in passing that, with respect to the regulation of the liabilities of successions, the sanctioned text of the *Act respecting Matrimonial Regimes* contained a discrepancy between the French and English texts of article 35. The French text replaced the former articles 1282 to 1288 by new articles 1282 to 1285, thereby repealing the former articles 1286 to 1288. The English text, however, left these three articles in effect. We had pointed out the discrepancy and advanced arguments in support of the conclusion that the French text should have priority in this instance⁴⁶¹. However, in the 1969 compilation of the *Statutes*, article 35 of chapter 77 corrected the discrepancy, but in conformity with the English text. Other arguments had to be found, based mainly on the text and on similar cases⁴⁶². Fortunately, the legislature has recently amended article 35 to conform to the French text⁴⁶³, thus affirming the repeal of articles 1286 to 1288.

Article 1284 stipulates that the creditors of the succession always have the right to be paid out of the entire property comprising the inheritance. Furthermore, in the event of outright acceptance by the husband, the creditors also have a recourse against the husband's private property and the common property to the exclusion of the reserved property. On the other hand, if the succession is accepted subject to the benefit of inventory, the creditors may only claim against the property included in the succession⁴⁶⁴.

Thus, the final liabilities in the case of debts of successions falling to the husband will depend, first of all, on the manner in which he accepted the succession. If his acceptance was outright, however, the creditors of the succession will have the same recourses as the creditors of debts attributable to the husband, except that, in our opinion, the household interest cannot have the same effect as in the last case.

220. In summary, it may be said that, in the case of debts attributable to the husband, the creditors may always claim against the husband's private property and against the property of the community, with the exception of the reserved property. In addition, the creditors may also claim against such reserved property if the debts, even those attributable to the husband, were contracted in the interest of the household. However, the creditors of the succession may only claim against the husband's private property and the property of the community, excluding the reserved property, in cases of outright acceptance. Furthermore, in such case, we do not feel that the creditors

can proceed for the payment of their claims against the reserved property because the household interest, which is the condition permitting the husband's creditors to claim against the reserved property, will not ordinarily exist in such case.

The regulation is somewhat more complex in the case of debts attributable to the wife.

2. Debts attributable to the wife

221. A wife no longer needs her husband's authorization to contract debts, carry on a trade or a calling or accept a succession. However, since the husband is still the administrator of the community, the law gives him the right to oppose certain acts entered into by the wife or the exercise of her trade. Such opposition no longer has any effect on the wife's capacity. Its only effect is to limit the recourse of creditors against the property of the community to the benefit derived by the community from the wife's acts or business dealings. Therefore, the provisional liabilities in the case of debts attributable to the wife will be established differently depending on whether such debts, regardless of their origin, were contracted with or without the husband's opposition.

(a) Debts contracted by the wife without opposition from her husband

222. Where a wife contracts a debt (article 1290, para. 2), carries on a trade (article 1291a, para. 1), or accepts a succession outright (article 1285, para. 2) without opposition from her husband, the wife's creditors may claim payment against the wife's private property and reserved property, as well as against the property of the community. The only patrimony excluded from such a recourse is that of the husband's private property by virtue of the first paragraph of article 1291b, although this exclusion may not be easy to establish because of the confusion between the husband's private property and the common property during the regime. Thus, when there is no opposition from the husband, the wife's creditors enjoy a greater degree of protection since they may proceed for the payment of their claims against three of the four existing patrimonies under the community. The regulation is somewhat different in the case of opposition from the husband.

(b) Debts contracted by the wife in spite of her husband's opposition

223. Two matters require consideration: the first relates to the opposition of the husband and the second to the provisional liabilities in the event of such opposition.

224. *Opposition of the husband.*—The second paragraph of article 1290 gives the husband the right to oppose an act entered into by his wife within three months of his knowledge of it. However, the Code requires no specific procedure in this respect. Furthermore, the last paragraph of article 1285 mentions opposition of the husband in connection with the acceptance of a succession by the wife, with no mention of a time limit nor specific procedure. However, the last paragraph of article 1291a, regulating the case of a wife common as to property carrying on a trade, provides that the deposit by the husband of a declaration indicating his opposition to his wife's trade, in the office of the protonotary of the Superior Court of the district where the trade or calling is carried on, shall establish the presumption of knowledge of such opposition by third persons.

Each of these articles regulates some aspect of the husband's opposition. In our opinion, it is possible to derive criteria applicable to cases of opposition from the elements contained therein. Thus, with respect to any act entered into by the wife alone, including acceptance of a succession, the husband may indicate his opposition within three months of his knowledge of such act, provided, of course, that he has not already consented thereto⁴⁶⁵. In the case of a trade or calling, however, the husband may make his opposition known at any time⁴⁶⁶, since its only effect will be in principle, not to bind the ordinary common property with respect to the wife's creditors⁴⁶⁷.

As regards proof of the husband's opposition, the Code provides guidelines only in connection with opposition to the wife's trade or calling. It seems clear that the husband may always deposit a declaration to that effect in the protonotary's office in the other cases. However, since such deposit is not always necessary, for example, if the wife has contracted with one individual, the husband may proceed by registered mail. The question is one of establishing proof, and may be resolved by the best available means according to the circumstances. The husband may always deposit his declaration in the protonotary's office thereby establishing a presumption with respect to third persons.

225. *Provisional liabilities in the event of opposition by the husband.*—As we have already mentioned, the husband's opposition has the effect of excluding ordinary common property from the provisional liabilities with respect to debts contracted by the wife in spite of such opposition. Thus, creditors may still proceed for the payment of their claims against the wife's private and reserved property, but they may also claim payment against the ordinary common property in spite of the husband's opposition, if the community has benefited, but only up to the amount of such profit. Although the Code places on the husband the burden of establishing proof that the community has benefited, but only in cases of successions accepted by the wife despite his opposition⁴⁶⁸, in our opinion, he should also have to establish such proof in the other cases because, the husband is the administrator of the community and he would seem to be the only one in a position to assess the

profit derived by the community. Furthermore, since the burden of proof of such profit is placed on the husband, third parties will not be prejudiced.

The Code thus strives to avoid binding the community without the consent of its administrator, without at the same time absolutely excluding ordinary common property from attachment by the wife's creditors, if the community has benefited from the acts, succession or business which produced the debts.

Of course, in this case, the husband's private property will be excluded from the provisional liabilities even more certainly than in the case of debts contracted by the wife without her husband's opposition. However, under the community, debts may be contracted jointly by both consorts.

3. Debts attributable to both spouses

226. The second paragraph of article 1291b provides for the case of joint and several debts. We must point out here that we are not establishing but rather acknowledging joint and several liability; the consorts may contract jointly and severally irrespective of the matrimonial regime. In such cases, the Code presumes that the debt becomes a debt of the community attributable to both spouses. The creditors may therefore claim, in such cases, against all existing patrimonies without exception. However, the same paragraph of article 1291b indicates that "when a consort gives his consent only to the incurring of the liability by the other, it becomes a debt of the community attributable to the latter only."

4. Pecuniary condemnations

227. Article 1294 provides for the recourse of creditors in the case of pecuniary condemnations. This article was amended in 1964 to make the community liable for pecuniary condemnations incurred by the wife⁴⁶⁹. It was again amended in 1969 "to take into account the distinction between the husband's private property and property of the community in the present text, and to specify that the provision covers both penal and civil condemnations"⁴⁷⁰. According to this article, if the condemnation is incurred by the wife, the creditors may not claim against the husband's private property; however, if it is incurred by the husband, legal action may not be taken against the reserved property of the wife.

The provisional liabilities do not always determine the contribution to debts, and in this respect, article 1291c indicates that when the community is obliged to pay a debt incurred during the marriage by one of the spouses in his own interest only, it is entitled to compensation. Therefore, the final liabilities are usually established at the time of dissolution through the settlement of compensation.

B. Final liabilities

228. The contribution to debts is determined at the end of the regime. We must then determine the nature of the debt, to what property it relates or, more generally, which patrimony benefited from the debts. The Code provides, however, that the community shall be liable for certain debts, and in such cases, the contribution to debts will usually be easy to determine. When there is no specific provision of the Code in this regard it is necessary to apply one of the principles governing the liabilities of the community: *ubi emolumentum, ibi onus*, in order to determine the final liabilities.

1. Common debts under the Code

229. Articles 1280 to 1283 and articles 1289 and 1296 of the Code provide that debts shall be common with respect to contribution. They are usually applications of the principle just stated; in some cases, however, because of modifications made to the regulation of the community, it seems that the principle cannot be applied absolutely, thus resulting in an unbalanced situation between the spouses. The Code definitely includes in the liabilities of the community all moveable debts contracted before the regime, debts contracted during the regime, arrears and interest of rents, repairs which attach to the usufruct of privately owned immoveables, debts contracted for the needs of the family and, finally, debts of successions or gifts. However, in order for such debts to be considered as definite debts of the community, they must meet certain conditions which we will now examine.

(a) Moveable debts contracted before the regime

230. These debts are regulated by articles 1280,1, and 1281 of the *Civil Code*. Since all moveables owned by the spouses before the beginning of the regime fall into the community, it seems logical that all moveable debts also fall into the community, and that the latter be responsible for discharging them. We point out that the assets and liabilities will not correspond completely in this case, since the debts which remain private property, even those pertaining to immoveables, are usually moveable debts.

In theory, there is no difference between the debts of the husband and those of the wife contracted before the regime; in both cases, these debts are definitely included in the liabilities of the community; article 1280,1 is explicit in this respect. However, in article 1291, the legislature requires that there be proof that the wife's debts were contracted before the marriage. Indeed, if, with respect to the provisional liabilities, the legislator took steps to ensure that a wife could not bind the property of the community without her husband's consent, it follows that he also make provisions to ensure that the community does not have to contribute to debts contracted by the wife without such consent.

Nevertheless, article 1281 does not lay down a separate fundamental rule for debts contracted by the wife before the regime. By requiring proof that such debts were contracted previously, the article seeks to prevent the community from having to contribute to a debt contracted by the wife during the regime in spite of her husband's opposition. Provided that a definite date prior to the beginning of the regime can be established by any of the means provided in the first paragraph of article 1281, the debt will be definitely included in the common liabilities. If that is not possible, according to the second paragraph of that article, it will be considered as a debt contracted during the regime in spite of the husband's opposition. It is, however, somewhat surprising that the legislator adopted this drastic solution. Indeed, for debts effectively contracted by the wife during the regime, the Code requires express opposition by the husband, within a certain time limit⁴⁷¹, or in a specific form⁴⁷², if they are to be excluded from the common liabilities. However, when in doubt as to the anteriority of the wife's debt, it is *ipso jure* contracted in spite of the husband's opposition. In our opinion, when in doubt, the Code ought also to have required express opposition by the husband.

However, the last paragraph of article 1281 permits the inclusion of the wife's debts in the final liabilities, when no proof of anteriority has been made, if they have been paid by the husband. In that case, the debt definitely falls into the liabilities of the community, without the husband being entitled to claim compensation either from his wife or from her heirs.

(b) Debts contracted during the regime

231. The difference between the debts of the husband and those of his wife is more significant with respect to debts contracted during the regime. Indeed, article 1280,2 provides that all debts contracted by the husband during the regime are definitely included in the common liabilities; on the other hand, if the debts are contracted by the wife, they are only included in the final liabilities if the husband made no objection. However, it seems to us that a debt contracted by the wife in spite of her husband's opposition is not absolutely excluded from the final liabilities of the community⁴⁷³. Indeed, just as the husband's opposition does not prevent the creditors from proceeding against the common property when the community has benefited from the wife's debts, we feel that, with respect to the final liabilities, these debts could be common as to contribution, up to the amount of the benefit derived by the community. This is the meaning to be given to article 1296. Moreover, this is the interpretation proposed by Pothier, with respect to the former law⁴⁷⁴, and by Mignault⁴⁷⁵, when the wife needed her husband's consent to make a valid contract. In our opinion, this interpretation is *a fortiori*, valid in the present context.

Once again, we can see the influence of the husband as the administrator of the community. The legislature is thus seeking to preclude the wife from binding the community against the wishes of its administrator. The weakness

of this technique is also apparent, however, since the Code does not require the husband to provide reasons for his opposition. Naturally, if the wife has reserved property, the solution is easier to understand because, then, the only revenues included in the common assets are those arising from the husband's property. On the other hand, if there is no such reserved property, the wife is clearly being placed in a subordinate position. We should remember however, that, as we will see later on, the husband must accept his wife's decision regarding acceptance or renunciation of the community at the time of dissolution, along with the consequences of her decision with respect to the fate of her reserved property.

232. Article 1280,2, which refers to articles 1290 to 1291c with respect to the wife's debts, also refers to article 1294 relating to pecuniary condemnations incurred by the spouses. The first reference is understandable since these articles regulate and establish the provisional liabilities in the wife's case according to the opposition or approval of her husband; these criteria contained in article 1280,2 make it possible to determine whether or not the wife's debt will fall into the final liabilities of the community. But what is the meaning of the reference to article 1294? Is it made only with respect to the wife's debts? It would appear, according to the wording of article 1280,2, that the reference to article 1294 concerns only the wife's debts although the text scarcely mentions the husband's opposition. Did the legislature intend to include in the final liabilities of the community pecuniary condemnations incurred by the wife? Those incurred by both spouses? We find it hard to consider either of these interpretations as valid. In fact, with respect to compensation received as damages, the legislature has opted for the same solution under the partnership of acquests⁴⁷⁶ and the community⁴⁷⁷ by providing that such amounts are the private property of the spouse who receives them. Furthermore, under the partnership of acquests, the Code requires compensation when, during the regime, the acquests have had to bear the cost of a fine incurred by one of the spouses in virtue of any penal provision of the law⁴⁷⁸. It would seem illogical, therefore, for the legislature to have intended, under the community, that pecuniary condemnations be included in the final liabilities; logically, the contribution to such debts should fall on the private property of the spouse who incurred the condemnation.⁴⁷⁹

However, this discussion does not settle the question of the reference in article 1280,2, to article 1294. Perhaps the intention was simply to refer to all articles relating to the provisional liabilities in an effort to avoid problems of interpretation.

(c) Arrears of personal rents

233. Article 1280,3 also includes in the final liabilities of the community "arrears and interest only of such rents and debts⁴⁸⁰ as are personal to either of the two consorts". These are arrears or interest owed by one of the spouses as a result of property received by gratuitous title, but by family arrangements. Although the property remains in the private ownership of the

spouse, since the arrears or interest are generally paid with the revenues derived from the property, and since such revenues are, in principle, common property, it seems logical that these debts be common as to contribution. However, since the amendment to article 1297 giving to the wife the administration and free disposal of her private property, the community may at times have to support the *onus* without having received the *emolumentum*.

(d) Usufructuary repairs

234. Article 1280,4 also provides that the repairs which attach to the usufruct of private immoveables are included in the final liabilities of the community. Here again, the Code follows the maxim *eudem sequi debet incommoda quem sequuntur commoda*. Traditionally, the community enjoyed a kind of usufruct of the private property of the spouses and the revenues arising from such property were included in the community. Since the regulation of the real right of usufruct renders the usufructuary liable for repairs paid with the fruits and revenues arising from the property subject to the usufruct⁴⁸¹, the regulation of the final liabilities renders the community liable for the same repairs. However, at the time of the last reform of matrimonial regimes, the community was deprived of full enjoyment of the wife's private property. Thus article 1297 may lead to an unbalanced situation if the wife spends all the fruits and revenues of her private property. An unbalanced situation may also arise if the husband does not, at the end of the regime⁴⁸², request his wife to turn over to the community the revenues received by her that remain unconsumed as well as property acquired by investing such revenues. In such a case, however, the husband would have only himself to blame.

(e) Debts contracted for the needs of the family

235. The last paragraph of article 1280 and article 1296 include the maintenance of the spouses, the education and support of the children, and all the other expenses of marriage in the final liabilities of the community. These are, in fact, what may be called "family debts". Articles 1280,5 and 1296 make the community liable for all debts contracted in satisfaction of family needs. Moreover, with respect to the provisional liabilities, such debts are always considered as debts contracted by the husband⁴⁸³ since, in such cases, the wife ordinarily acts within the mandate of article 180. However, where final liabilities are concerned, notwithstanding the provision of article 1280,5, we cannot overlook article 1425h, which requires the wife to contribute to household expenses from her reserved property. Therefore, if the wife has reserved property, such family debts will be a common liability with respect to ordinary common property and reserved property. In fact, if the wife accepts the community, there will be no problem since, in that event, the reserved property will increase the mass of the community. However, if she renounces the community, thereby retaining her reserved property free

and clear of all debts, such property will not thereby be freed from contribution to family debts⁴⁸⁴.

(f) Debts resulting from successions

236. In the case of property received by gratuitous title, the Code also supplies the maxim *ubi emolumentum, ibi onus*. Indeed, article 1280,1 refers *in fine* to articles 1282 to 1285 in order to include in the final liabilities of the community debts with which the successions, legacies or gifts that fall to the consorts during the marriage are charged. Article 1282 lays down the principle that must be applied: the debts are chargeable to the spouse to the extent that the property remains in his private ownership, and are chargeable to the community to the extent that the property is common property. Thus, all debts due by immoveable successions received from ascendants will usually be private in nature. On the other hand, if the *de cujus* is not an ascendant and has not included a clause of private ownership in his will, the debts of his succession will be common as to contribution since the property of the succession will also be common.

2. Debts which the Code does not explicitly include in the final liabilities

237. It has been stated that, "in principle, debts common as to liability are also common as to contribution, save an express provision of the law providing for 'compensation'"⁴⁸⁵. In our opinion, this statement can serve as a guide in determining the final liabilities in cases which are not explicitly provided for by the Code. It does not seem necessary to reiterate our consideration of the provisional liabilities in order to identify those cases in which the Code excludes, as to contribution, a debt which it had considered as a common liability. It should however, be noted that article 1291c lays down a general rule which will prove to be very useful in such cases: when the community has been obliged to pay a debt incurred during the marriage by one of the spouses in his own interest only, it is entitled to compensation. We should also point out that, with respect to the debts of property received by gratuitous title, article 1284 provides for compensation that will be required in accordance with the principle established under article 1282.

238. Our study of the composition of the community has shown the complex nature of this regime. This complexity has progressively increased with the reforms of matrimonial regimes, as the legislature simply made partial changes in the techniques which have traditionally been applied by this regime. Such half-measures, usually intended to improve the appearance of this regime, have the opposite effect because the logic of the traditional subordination techniques has been modified by techniques which,

though they fundamentally remain subordination techniques, are logically inconsistent because they are substantially coordination techniques. We have had some indication of this problem in considering the composition of the community of property, and it emerges even more clearly in connection with the administration of the community.

Section 2

Administration of the community

239. We use the word “administration” in the sense given to it by the Code, as including not only acts of administration *stricto sensu*, but also acts of disposition. We shall also consider in this section the administration of the ordinary common property, the reserved property and the private property of each consort. Since the 1931 Act, the legislature has attempted to remove the absolute control of the husband over all property, specifically in the areas of administration of property and distribution of powers. In each of the major reforms—1931, 1964 and 1969—the legislature has usually transferred the administration of part of the property from the “jurisdiction” of the husband to that of the wife, and he has at the same time required the concurrence of both spouses with respect to acts of disposition of certain property. Thus, from being the lord and master before 1931 the husband is now only the administrator of part of the common property. We shall not pause here to consider this evolution at any length⁴⁸⁶, as the nature of this work requires that we confine ourselves to the present regulation governing the administration of the common property, the reserved property and the private property.

Paragraph I

Administration of the common property

240. Article 1292 governs the administration of ordinary common property. It indicates that “the husband alone administers the property of the community”, but it must be understood that this statement concerns, on the one hand, the administration *stricto sensu*, and on the other hand, the property entrusted to the administration of the husband, namely the ordinary common property. This property does not include either the reserved property nor the revenues derived from the private property of the wife.

Furthermore, article 1292 gives to the husband alone certain powers with respect to certain acts while requiring the concurrence of his wife with respect to other acts.

A. Powers granted to the husband alone

241. Article 1292 regulates the husband's powers with respect to acts of administration *stricto sensu* and acts of disposition by onerous and gratuitous title, and also provides for the case of insurances.

1. Acts of administration *stricto sensu*

242. The first paragraph of article 1292, quoted above, gives the husband the power to administer alone the property of the community. However, this provision contains two reservations: the provisions of articles 1293 and 1425a and following. Strictly speaking, article 1293 is not a reservation with respect to acts of administration since it contains a prohibition against bequeathing more than one's share in the community; it is actually a clarification with respect to acts of disposition by gratuitous title, as we will see later on. On the other hand, the reference to articles 1425a and following, excludes the reserved property from the husband's administration. Moreover, we feel that some reference to article 1297 would have been advisable since that article in fact confers on the wife the administration of property that is common by nature. Consequently, if the intention of the first paragraph of article 1292 was to specify the extent of the husband's powers of administration, the principle should have been established subject to article 1297 as well.

Thus, it is hardly accurate to say that the husband administers the property of the community by himself. It would be more accurate to say that he administers the property of the community that is not entrusted to the wife's administration¹⁸⁷. He thus has a "residuary power" of administration. However, with respect to the property entrusted to the husband's administration, he alone has the powers of administration *stricto sensu* regarding moveables as well as immoveables.

2. Acts of disposition for valuable consideration

243. With respect to acts of disposition for valuable consideration, the second paragraph of article 1292 makes a distinction between acts affecting moveables and those affecting immoveables. The husband may generally dispose alone of any moveable property of the community, although the same provision requires the concurrence of his wife for acts affecting the

household furniture and a business. On the other hand, the husband may not dispose of any immoveable property of the community by himself.

Two principles underly the second paragraph of article 1292; it reflects, on the one hand, the old maxim *res mobilis, res vilis*, and on the other hand, the intention to give the family a certain degree of protection. We wish to point out the anachronism of the powers granted to the husband with respect to acts of disposition of moveable property, which, in some cases, may represent the major part of the property in the community. Furthermore, the intention to protect the family is apparent at two levels, but only partially. It applies at two levels because protection is provided for the household furniture on the one hand, and on the other hand, for a business as a possible source of income for the family. This protection is, however, only partial, as no specific measures are provided for the protection of the dwelling containing the household furniture.

3. Acts of disposition by gratuitous title

244. As under the partnership of acquests and for the same reasons⁴⁸⁸, the third paragraph of article 1292 prohibits the husband from disposing of the property of the community by gratuitous title *inter vivos*. Nevertheless, as under the partnership of acquests⁴⁸⁹, the husband may always dispose of modest sums and customary presents.

Furthermore, with regard to dispositions in contemplation of death *inter vivos*, the Code stipulates in article 1293 that a spouse cannot bequeath more than his share in the community. This is not a limitation but rather a forerunner to the rules of partition and, in particular, to article 1361.

4. Insurances

245. The last paragraph of article 1292, under the community, applies the same rules as a corresponding paragraph under the partnership of acquests in article 1266o⁴⁹⁰. Since both provisions are identical, we do not feel it requires further comment.

B. Acts requiring the wife's concurrence

246. The Code requires the wife's concurrence for certain acts of disposition. This is an example of a coordination technique which has been superimposed on the subordination techniques of the community, in particular, the common property and single administration. Thus, the husband requires the concurrence of his wife to dispose for valuable consideration

(sell, alienate or hypothecate according to the second paragraph of article 1292) any immoveable property of the community and such concurrence is also required with respect to the household furniture and a business. Of course, the husband may always avail himself of article 182 and, when the conditions required by that article are met, apply for authorization to enter alone into a given act of disposition.

An effort has thus been made to protect the only "important" property, from the standpoint of the Middle Ages, namely the immoveables, and at the same time to give the family some protection. The technique of the concurrence of the spouses is that commonly used in comparative law to attain the objective of family protection. It could also be valuable in protecting the important property, provided, however, that the protection is in fact extended to all important property and not just the immoveables.

247. Concurrence is also required by the Code in cases of dispositions of common property by gratuitous title *inter vivos*. However, the justification for this technique is the same here as under the partnership of acquests⁴⁹¹. Its purpose is to prevent the administrator, the husband, from stripping the common patrimony of its contents without his wife's consent. Here again, of course, article 182 may be applied.

Paragraph II

Administration of the reserved property

248. Since the 1969 reform, article 1425a has been an exact counterpart of article 1292, for although the wording of these two articles is not identical, they have the same content⁴⁹².

Before that reform, the wife had more extensive powers over her reserved property than the husband had over the common property⁴⁹³, but a balance has been established. The wife may act alone with respect to the administration, *stricto sensu*, of her reserved property, and may dispose of moveable property for valuable consideration, except for the household furniture and the stocks in trade. In both these cases, as in dispositions of immoveables for valuable consideration and in all acts of disposition by gratuitous title *inter vivos*, she needs the concurrence of her husband. She may nonetheless proceed like her husband with respect to insurance, annuities and pensions. However, she may avail herself of article 182 to apply for judicial authorization.

On the other hand, article 1425a does not expressly authorize the wife to dispose of her reserved property by gratuitous title when modest sums or customary presents are involved. We do not feel, however, that it was the intent of the legislature to forbid her to make such dispositions.

Paragraph III

Administration of the private property

249. The administration of the husband's private property does not raise any special problems. This property has always been under his administration; he has also always administered the fruits and revenues arising from his private property, which are, however, common property⁴⁹⁴. However, in disposing of the fruits and revenues from his private property, the husband may require the concurrence of his wife⁴⁹⁵.

On the other hand, the regulation of the administration of the wife's private property has been significantly modified by the reforms of matrimonial regimes. Until 1964, the administration of the wife's private property had been entrusted to the husband who was however required to obtain his wife's consent to alienate immoveables⁴⁹⁶. In 1964, the wife was made responsible for its administration, subject to turning over to the community the revenues derived from it; she also needed her husband's consent to alienate immoveables, stocks in trade and the household furniture⁴⁹⁷. In addition, the husband could apply to the court for the withdrawal of such powers⁴⁹⁸. Finally, in 1969, the wife obtained the administration and free disposal of all her private property, although she must turn over to the community, on her husband's request, the fruits and revenues received by her that remain unconsumed, as well as property acquired therewith⁴⁹⁹.

250. In our opinion, there seems to be a dual disproportion with respect to the administration of private property, a disproportion which operates in favour of the wife in both cases.

Firstly, article 1291b excludes from both the provisional liabilities and the final liabilities the private property of the spouse of the spouse who rendered the community liable for a debt. The private property of the wife may easily be excluded in the case where the community becomes liable for a debt attributable to the husband since such private property will not be confused with the common property. On the other hand, when the community becomes liable for a debt attributable to the wife, exclusion of the husband's private property will, in practice, be more difficult since it will be confused with the common property. From a legal point of view, taking only article 1291b into consideration, the balance is perfect, but, in practice, it may be destroyed.

Quite a different case is the unbalance affecting acts of disposition relating to the revenues of private property. Indeed, the husband may only dispose of immoveable property, business and household furniture for valuable consideration with the concurrence of his wife, except for modest sums and customary presents; he may never dispose of the revenues of his private property by gratuitous title *inter vivos* without the concurrence of his wife since, in practice, such revenues fall into the community⁵⁰⁰. On the other hand, if our interpretation of article 1297⁵⁰¹ is correct, the wife may

dispose of the revenues of her private property as she likes, whether by gratuitous or onerous title. She is subject to no limitation; at her husband's request, she will only be required to turn over the unconsumed revenues derived from her private property, whether such unconsumed revenues are in the form of cash or investment.

In our opinion, there is an obvious unbalance with respect to the administration of private property.

251. The provisions regulating the administration of property under the community still show strong indications of unbalance. It is interesting to note that we have moved from a situation of absolute dominance by the husband, in 1931, with its corollary of total subordination of the wife, to a situation of balance with respect to the administration of certain categories of property and a situation of unbalance with respect to other categories. In our opinion, these situations are due to the fact that the legislature has throughout retained the basic subordination techniques—common property and single administration—while at the same time attempting to free the wife from a subordinate position. The result has been that, at each reform, one unbalanced situation was partly corrected while another was created in some other area. Thus, at the time of the 1964 reform, the legislature established a balance, in principle, with respect to the administration of the ordinary property and that of the revenues derived from the wife's private property, and concurrently created an unbalanced situation with respect to the reserved property. In 1969, the provisions regulating the reserved property and ordinary common property established a balanced situation with respect to administration, but the legislature created an unbalanced situation with respect to the revenues derived from private property. In contrast with the situation prevailing before 1964, these unbalanced situations are always in the wife's favour. However, it should be possible to correct such situations at the time of the dissolution of the community. Has the legislature in fact succeeded in correcting them in its regulation of the dissolution and partition? We must now examine these questions in this perspective.

Section 3

Dissolution of the community

252. According to article 1310, the causes of dissolution of the community are the same as those provided in article 1266r for the partnership of acquets. Therefore, it does not seem necessary to consider them again⁵⁰². We should point out, however, that separation of property may be requested only by the wife, and under conditions different from those required under the partnership of acquets⁵⁰³. Furthermore, as was the case under the

partnership of acquests, the regulation of the dissolution of the community puts into motion all the mechanisms of the regime to achieve its objectives.

The dissolution of the community also tends to reestablish a static balance between the private patrimonies and strives to create a dynamic balance with respect to the common property. However, this search for balance at two levels depends in large measure on the choices made by the wife.

We will examine the most important aspects of this very technical regulation, considering first the wife's option, then the static balance, and finally the dynamic balance.

Paragraph I

Options of the wife

253. Whereas both spouses have a choice to make when there is cause for dissolution of the regime under the partnership of acquests, under the community, only the wife, in theory, makes a choice. Article 1338 provides that "After the dissolution of the community, the wife or her heirs or legal representatives, have a right either to accept or renounce it; any agreement to the contrary is void." It is thus a matter of a legal requirement from which the spouses may not depart by agreement. It is quite understandable that, when the husband was lord and master of the community, the wife alone decided on the advisability of accepting or renouncing the community. The husband did administer all the property and could dispose of it without limitation⁵⁰⁴. However, as the husband lost the administration of certain property, and, in addition, as the legislature imposed certain controls on him with respect to acts of disposition, we feel that the legislature ought to have reviewed the regulation and made the necessary amendments. Basically, the legislature has made no significant amendments in this area, and consequently, only the wife may accept or renounce the community even though the surviving spouse and the heirs have option rights when the regime is dissolved by the death of one of the spouses and when the spouse dies intestate; however, these rights are not exactly the same.

A. Acceptance of the community by the wife

254. The formal requirements and time limits are not as strict under the community of property as under the partnership of acquests and the regulation remains more complex under the community due to the fact that it is more analytical.

The Code only regulates forms of tacit or forced acceptance. Acceptance is tacit according to article 1340 when "a wife of full age has once assumed the quality of common as to property"⁵⁰⁵, and unless there has been fraud on the part of the heirs of the husband, a wife may no longer renounce it. Some may think that this is more a case of forced acceptance, but it must not be forgotten that, under the community also, acceptance or renunciation once made is irrevocable. Although the regulation of the community does not include an article as explicit as article 1266x, we are led to this conclusion after consideration of article 1340, with respect to the wife of full age, and article 1341, with respect to the wife under age. Moreover, according to article 1339, the wife will be forced to accept when she has intermeddled with the property of the community; the article specifies, however, that acts of mere administration or of a conservatory nature do not constitute intermeddling. Furthermore, article 1348 stipulates that a widow who has abstracted or concealed any of the effects of the community is declared to be in community, notwithstanding her renunciation⁵⁰⁶.

Article 1342 of the Code also imposes on the surviving wife the obligation to cause an inventory to be made of all the property of the community within three months of her husband's death, in the presence of the husband's heirs or after having duly summoned them; this inventory must be made in notarial form *en minute*. However, article 1343 relieves the wife of this obligation when the regime is not dissolved by the death of the husband, when the heirs are in possession of all the property, when an inventory has already been made, or when proof is established that no property exists. In addition to the three months in which to make an inventory, article 1344 gives the wife a delay of forty days for deliberation. Thus, the delay is shorter under the community, but, although article 1345 appears to lay down an absolute time limit for renunciation, this is not the case. First of all, no provision expressly stipulates that the wife is deemed to have accepted the community at the end of the delay of three months and forty days; on the contrary, article 1346 permits the wife to request an extension of the delays and article 1347 provides that a wife who has not made an inventory nor renounced within the prescribed delays is not thereby precluded from doing so, provided she has not intermeddled nor acted as being in community. Thus, except where the wife has intermeddled or assumed the quality of common as to property, notwithstanding the provisions requiring her to cause an inventory to be made in the prescribed delays, she may always renounce⁵⁰⁷.

255. However, in addition to these formal conditions which must be observed, the wife may have a fundamental choice to make when the community is accepted. If the dissolution takes place during the lifetime of the spouses, or if a will determines the fate of the deceased's property, and if the wife has reserved property, she must in accordance with article 1425f choose between keeping the reserved property and including it in the community. Disregarding for the moment the choice which must be made under

article 624c, the wife who has reserved property makes an independent decision with respect to the reserved property and common property.

In our opinion, an important anomaly exists under the community in this regard. Since the husband is no longer lord and master of the community, even the advisability of article 1338—which gives only the wife or her heirs the right to accept or renounce the community—may be questioned. However, such a provision may still be justified on the grounds that the husband remains the administrator of the ordinary common property. On the other hand, with respect to reserved property and applying the same logic, the husband should be given the option of acceptance or renunciation since the wife acts with respect to her reserved property in exactly the same manner as the husband does with respect to the ordinary common property.

According to the present regulation, the right to accept or renounce is in both cases given only to the wife. Of course, if she accepts the community, she is required to turn over her reserved property to the community. However, such a decision could be prompted by the realization that the reserved property shows a deficit—due to possible maladministration by the wife—and at the same time by the fact that the community—thanks to proper administration by the husband—shows a positive balance. In such circumstances, the wife's poor administration would be borne by the husband. On the other hand, assuming the reverse situation, if the reserved property showed a positive balance while the community showed a negative balance, the wife could simply renounce the community, thereby avoiding the ill effects of her husband's administration. Our criticism is not directed at the second situation, which seems quite fair, but at the first.

The legislature has not modified the regulation respecting acceptance or renunciation, but has changed the composition of the property to be divided and its administration, thereby adopting solutions which do not correspond to the general regulation of the community.

B. Renunciation of the community by the wife

256. The formal requirements considered above⁵⁰⁸ also apply to renunciation. However, article 1345 indicates that renunciation must be made by notarial form *en minute* or a judicial declaration as it was the case under the partnership of acquests⁵⁰⁹. Article 1353a also indicates that the renunciation must be registered. Furthermore, provisions to protect creditors, identical to those we considered under the partnership of acquests⁵¹⁰, appear in article 1351. Since the situations and the provisions are the same as those we examined under the partnership of acquests, we shall simply refer the reader to that study⁵¹¹. Furthermore, if the wife renounces the community, she will keep her reserved property free and clear of all debts other than those contracted by the husband in the interest of the household. It should also be

noted that, according to article 1425f, this option is open only to heirs of the wife in the direct line of descent.

If the wife has renounced the community, article 1379 specifies that she has no share in the property of the community, not even in the moveable property she herself brought into it. However, article 1380 allows her to retain her wearing apparel and linen. In addition, for somewhat similar reasons, article 1352 gives the wife the right to sustain herself at the cost of the community during the period of inventory and deliberation. It is thus understandable that the second paragraph of article 1383 specifies that the heirs of the wife shall not enjoy those rights conferred on her by article 1380 and 1352. She also has other rights, provided under articles 1381 and 1382, but they relate more to the reestablishment of the static balance.

C. Option at the time of the spouse's death

257. If the community is dissolved by the death of the wife, the study we have just made with respect to acceptance and renunciation, applies also to her heirs according to article 1353, saving, of course, that they are not obliged to make an inventory. Article 1349 provides that if the widow dies after the community has been dissolved, but without having yet accepted or renounced it, her heirs shall assume the undischarged obligations as to inventory and may have the benefit of further delays.

However, when the community is dissolved by the death of a spouse who dies intestate, the provisions of article 624c will require the surviving spouse to make decisions with respect to the existing patrimonies. The choices open to the surviving spouse differ depending on whether it is the husband or the wife, for each spouse stands in a different position with respect to the existing patrimonies. Article 624c which regulates these options, is not one of the clearest provisions of the Code; in addition, there are not many decisions on the matter and academic opinion conflicts in certain respects.

1. Options of the husband

258. If the wife dies intestate, her husband must choose between the succession and the community. If the husband renounces the wife's intestate succession, article 624c will not apply although the composition of the community will then depend on the choice made by the wife's heirs. On the other hand, if the husband opts for the succession, article 624c, which is notably ambiguous in this regard, will apply.

It was ambiguous before the last reform, but it became practically incomprehensible in 1969 due, in our opinion, to the misplaced interpolation

of a provision relating to the husband, and to the disconcerting insertion of a disjunctive conjunction. Be that as it may, since, according to article 1338, the husband does not have the option of renouncing, article 624c uses other terminology. If we understand the article correctly, in order to succeed to his wife, the husband must pay into the successional mass, as if it were a return, his share in the community, *when such community has been accepted by the succession of his wife*. He must also abandon to such mass all the advantages conferred on him by the marriage contract, as well as his rights to the proceeds of insurance policies of which he is the beneficiary. Therefore, if the wife's succession accepts the community, it is possible, though not easy, to determine the property he has to renounce⁵¹². Article 624c is also interpreted to mean that if the wife's heirs renounce the community, the husband may succeed while keeping the entire property of the community presuming that it shows a deficit. He will, nevertheless, have to give up all other benefits⁵¹³.

Furthermore, disregarding the other property that will have to be given up by the husband, and dealing only with the community, in order to succeed, the husband must give up the half of the common property that falls to him if the wife's heirs accept the community⁵¹⁴. On the other hand, if they renounce the community, it will belong to the husband. We must remember that this matrimonial regime is different from that of the partnership of acquests, and that, in making their decision, the heirs were able to take into account the composition of the community, and perhaps that of the reserved property.

2. Options of the wife

259. The options open to the wife when her husband dies intestate are the same except for the problem raised by the reserved property. It should first be noted that, where the wife is concerned, article 624c expressly provides that she must renounce all her rights in the community of property, and that, since she is the only one able to renounce, she will never be in the same position as the husband when the wife's heirs renounced the community. With respect to the options open to her, the wife must, of course, consider the composition of the community, that of the reserved property and that of the succession. If she has no reserved property and if she accepts the community, article 624c will not apply. On the other hand, if she has reserved property, her first choice will depend on whether it is more advantageous to include the reserved property in the community and accept the partition of the community, while retaining other possible benefits, including insurance policies, or whether it is more advantageous to renounce the community and other possible benefits and succeed her husband, bearing in mind that, in that event, the entire property of the community will be included in

the husband's succession⁵¹⁵. However, what happens in that case to the reserved property? Must it be returned to the common mass? Will the wife be able to retain it and still be entitled to her husband's *ab intestat* succession? This second solution appears to have been adopted in a judicial precedent⁵¹⁶, although the issue was not the same; it had also been earlier suggested by one authority⁵¹⁷. Article 1425f might lend support to this solution, although it may be somewhat surprising that the wife may retain part of the common property notwithstanding the provisions of article 624c. Other authors⁵¹⁸, on the other hand, feel that, in spite of article 1425f, the provision of article 624c to the effect that the wife must abandon *all her rights* in the community, means that in cases of intestate succession, she must renounce the community and return her reserved property in order to succeed. We prefer this solution.

260. In spite of the title of this paragraph (options of the wife), when the community is dissolved by death and the spouse dies intestate, the husband may face certain options as well as the wife. However, as opposed to the situation under the partnership of acquests, when the wife renounces the community, such renunciation may have certain effects due to the subordination techniques. It will then be necessary to ensure that static balance is reestablished, especially with regard to the private property of the wife that may be included in the community.

Paragraph II

Reestablishing static balance

261. As a regime based on the partition of property, the community is concerned with the distribution of certain property between the spouses; however, this dynamic balance aiming at the partition of the moveables and acquests, must be preceded by the reestablishment of a static balance between the private property of the consorts. The purpose of reestablishing static balance is to rectify unwarranted transfers between the patrimonies, in other words, to rectify transfers of property which may have taken place during the regime, benefiting one patrimony at the expense of the other, when such transfers were not provided by the rules governing the regime⁵¹⁹. However, compensation and reprises under the community were once thought to be based on the long-standing prohibition imposed on the spouses against making gifts to each other *inter vivos*⁵²⁰, but since the disappearance of this prohibition from our law⁵²¹, this basis must be discarded. Reprises and compensation were also said to be based on the principle of immutability of matrimonial regimes⁵²², which was itself based on the prohibition against gifts, but this principle has also disappeared from our law⁵²³. We are thus left with one

possibility, which moreover appears to be the real basis for the compensation procedure: the simple rule of partnerships according to which, before any partition, each partner may pretake anything not included in his contribution, or must return whatever is included in that contribution⁵²⁴.

262. Moreover, in its regulation designed to reestablish static balance, that is, to leave each spouse in the position he occupied before the regime with respect to property not included in the partition, the Code uses a variety of terms: it uses the words “reprises”, “compensation”, “indemnity”, “returns” and “pretaking”. In some cases, the meaning of these words does not raise any problems, but in others, they are used as synonyms. We should therefore clarify their meanings.

The word *reprise* corresponds to the procedure to be carried out when the private property of either consort, or its value, is temporarily included in the community. Clearly, before proceeding with partition, such property or value, which is only accidentally included in the community, must be excluded from it. This reprise is ordinarily made by “*pretaking*” either in kind, if it is private property that is included in the community, or in value, if, for example, the proceeds of the sale of private property are included in the community.

The word *compensation* is used as a synonym for *indemnity*, although compensation is ordinarily used when the community has a claim against one spouse, and indemnity when one of the spouses has a claim against the community. In our opinion, the word compensation could be used in both cases since both involve rectifying the benefit received by one patrimony at the expense of the other, when such a benefit was not provided for by the rules governing the regime. When compensation is owed by one spouse to the community, a *return* is usually made to the mass of the community. On the other hand, when compensation is owed by the community, the reprise is made in the form of a pretaking.

263. Under the community of property, whether the wife accepts or renounces the partition of the community, these procedures are always necessary on her part. She must pretake her private property temporarily included in the community even if she renounces, but there must also be reciprocal compensation between her and the community. Furthermore, if the wife renounces the community, the procedure for pretaking and compensation between the husband and the community will not, in theory, be required since he will retain the community, and it will then be unnecessary to reestablish static balance between the common patrimony and that of the husband’s private property as both will then belong to him following renunciation by the wife. On the other hand, if the wife accepts the community, such procedures between the common patrimony and the husband’s private property will also be required in order to determine the composition of the common patrimony which, once static balance has been reestablished, must be divided in order to achieve a dynamic balance.

A. Reestablishing static balance when the wife renounces the community

264. Although the Code specifies that the wife cannot claim any share in the property of the community when she renounces the community, articles 1380 and 1352 do give her certain rights, for humanitarian reasons, which have been discussed above⁵²⁵. However, static balance must be reestablished for, just as she cannot claim any right in the common property, according to article 1379, care must also be taken to ensure that the community is not enriched at the expense of the wife's private property. Articles 1381 and 1382 contain the principal provisions relating to the wife's reprises and to compensation.

1. The wife's reprises

265. Article 1381 gives the wife who renounces the community the right to take back her private property, or any property acquired in replacement of it, as well as the price of her private property that has been alienated and that has not been invested or reinvested⁵²⁶. Before the 1969 reform, article 1381 only permitted the wife to take back her immoveables or the price of her private immovable property⁵²⁷. At the time of the last reform, this article was amended to replace the word "immoveable" with the word "property". The meaning of the article since the last reform may nevertheless be questioned since article 1297 granted the wife the administration and free disposal of her private property. The reprises provided for by article 1381 have some meaning when the wife is fully subordinated to her husband with respect to private property and when her private property is administered by her husband. In these circumstances, it is understandable that a wife who renounces should be given the right to take back all her private property which is under her husband's administration at the time of dissolution. However, when the Code makes the wife responsible for the administration of her private property, such property will be under her administration at the time of dissolution, particularly if our interpretation of article 1297⁵²⁸ is accepted, and the provisions of article 1381, 1 and 2 may consequently be inapplicable. Bearing in mind that the husband will be entitled to demand the fruits and revenues derived from private property as they are received, he will be able to obtain only such fruits and revenues which are common property. The husband may no longer administer the wife's private property, unless she so desires.

We do not question the principle of reestablishing static balance; we only intended to indicate that, in general, the community will no longer include the wife's private property due to article 1297. The legislature has maintained and extended the application of article 1381 which gives the wife the right to take back her private property when she renounces. The princi-

ple is an excellent one, but it is questionable whether such a provision was necessary after the 1969 reform. However, should the wife's private property be included in the property of the community, she may always take it back. Article 1358 may be used by analogy with respect to the form of such reprises by way of pretaking.

2. Compensation

266. With regard to compensation, article 1381,3 specifies that the wife who renounces is entitled to take back the indemnities which may be due to her from the community, whereas article 1382 frees the wife who renounces from all contribution to the debts of the community except from those personally assumed by her; however, the provisions of article 1291c should not be overlooked in this regard.

Static balance must still be reestablished, and in this regard, if the community owes compensation to the wife, article 1381,3 provides for pretaking. Furthermore, we might think that the wife is freed from compensation she may owe to the community, if we consider only the provisions relating to renunciation of the community and its effects, but if renunciation is considered in the general context of the community, we must necessarily contemplate the possibility of compensation owed to the community by the wife.

Indeed, one of the basic principles of the regime is the re-establishment of the static balance, and consequently, in order to re-establish such a balance, the principle must be applied when compensation is owed to the wife as well as when it is owed to the community. Article 1291c is explicit in this regard. In the case of mutable private property⁵²⁹ as well as in the case of property received by gratuitous title⁵³⁰, the wife may owe compensation to the community, or compensation may be owed by the latter to the wife.

However, it will only be necessary to re-establish static balance between the community and the wife since we are considering the case where the wife renounces. Reprises and compensation must also be examined in the case where the wife accepts the community.

B. Re-establishing static balance when the wife accepts the community

267. If the wife has accepted the community, the re-establishment of static balance requires that each consort be able to take back whatever private property is included in the community. There must also be a settlement of compensation that may be due between each spouse and the

community. Such reprises and compensation are subject to the same principles whether the husband or the wife is involved, although some priority is given to the wife.

1. Reprises

268. Article 1357 essentially reproduces article 1381, which we have just studied, and gives the spouses or their heirs the right to pretake out of the mass of the community their private property that has been accidentally included in the community⁵³¹. Both spouses have the same rights regarding property that may be pretaken. However, article 1358 provides that the pretakings of the wife take precedence over those of the husband, with the further provision that if the property no longer exists in kind, the pretakings shall first be effected upon the ready money, next upon the moveable property, and finally upon the immoveables; in the last case, the choice of the immoveables is left to the wife or her heirs. However, that is not the whole extent of the wife's priority since article 1359 treats the husband's reprises differently from those of the wife. Indeed, if the community proves to be insufficient, the wife or her heirs may exercise their reprises upon the private property of the husband as well.

This regulation raises certain difficulties, but they relate more to the inherent logic of the legislation than to practical application. Nevertheless, they should be noted. The husband no longer has the administration and enjoyment of the wife's private property, yet the Code continues to give her a double priority with respect to reprises. On the one hand, she takes precedence and has a choice if the reprises are to be exercised upon immoveables; on the other hand, she may even pretake upon the husband's private property. Thus, it is conceivable that, in spite of his wife's acceptance of the community, the husband is excluded from the reprises if the community proved to be insufficient with respect to the wife's reprises. Nevertheless, in such circumstances, the wife would normally have renounced the community, for if it is insufficient with respect to reprises, there will obviously be nothing to divide.

Furthermore, because the wife has the administration and free disposal of her private property, it will be unusual for her to pretake upon the property of the community.

The illogicality of this regulation remains. Indeed, since each spouse now administers his or her own private property under the community, and there is even an unbalanced situation favouring the wife due to the fact that she can keep the fruits and revenues of her private property until they are requested by the husband, hence it is illogical for the Code to give precedence to one rather than the other with respect to reprises. It is even more illogical for the wife to be allowed to pretake upon her husband's private property when the community is insufficient, since she will have benefited from the revenues of

her private property, whereas those of the husband are necessarily included in the community. In addition to reprises, however, the matter of compensation must be settled before there can be partition of the community.

2. Compensation

269. With static balance still the prime consideration, compensation must be established and settled in order to determine the composition of the mass for partition. In this regard, articles 1291c and 1304 lay down the same principle: compensation is owed to the community when one of the private patrimonies grew at the expense of the community. However, although these articles apply this principle only when a consort is indebted to the community, the very concept of static balance and the other articles regulating compensation imply that balance must always be re-established between each spouse and the community; the procedure for re-establishing this balance must operate in both directions. Consequently, in some cases, compensation will be owed to the community by one spouse, while in others, the opposite will be true.

270. Some provisions in the Code regulate compensation owed by one spouse to the community: thus, article 1277, describing immoveables received by family arrangement, provides for the possibility of compensation when debts encumbering the property received exceed the value thereof. In such a case, since the property remains in private ownership, the community will have borne part of the debt and will be entitled to compensation from the consort's private property. In addition, article 1304 regulates other cases in which a consort will owe compensation to the community: the cases of improvements made to a private immoveable using common property, the discharge of encumbrances on a private immoveable, again using common funds, the payment of personal debts, or the use of common property for the exclusive benefit of one of the consorts.

The Code also regulates other cases which will ordinarily involve compensation by one spouse to the community. Article 1356 provides for the case where one spouse has benefited a child of another marriage using money drawn from the community; the same article also provides for the case where a spouse personally endows a common child, again with funds drawn from the community. In both cases, the spouse will owe compensation to the community. The provision of article 1308, however, cannot be considered as a case of compensation. If the spouses have jointly benefited a common child out of common property, without any mention of proportion, they are deemed to contribute equally. However, if the benefit was furnished or promised out of private property, the spouse who has used his private property to benefit the child has a right to be indemnified out of the property of the debtor for one half of what he has so furnished. We are thus not concerned here with compensation owed by one spouse to the

community or by the latter to a consort; such a case is not provided for by the regulation of the regime.

271. The other cases of compensation provided by the Code are reversible, in the sense that compensation may sometimes be owed by a spouse to the community, and sometimes vice versa. This is true of the exchange of a private immoveable⁵³², or the acquisition of part of an immoveable which was held in private co-ownership by the consort⁵³³. In these cases, depending on the amount of the funds used in the exchange or acquisition, compensation will be owed by the spouse to the community if the property remains private, or by the community to the spouse if it becomes common property. On a similar basis, articles 1282, 1284, 1285 and 1289 taken together imply reversible compensation, depending on the circumstances, with respect to property received by gratuitous title.

272. With respect to the evaluation of compensation, the regulation of the community is much less complex than that of the partnership of acquets. Indeed, the last part of article 1307 specifies: "In all cases, it (the compensation) consists of the price brought by the sale and not of the real or conventional value of the immoveable sold". Consequently, in order to determine the amount of the compensation, we need only know the amount by which the community benefited from the private property, or the amount by which the private property benefited from the community property⁵³⁴. Thus, in our opinion, as opposed to the situation under the partnership of acquets⁵³⁵, under the community, the evaluation of compensation takes into consideration the enrichment of the patrimony owing compensation, and the losses suffered by the patrimony to which it is owed, although the compensation is not affected by fluctuations in property value since this value is set at the sum used in the transaction. In our opinion, in spite of the criticisms we made with respect to the evaluation of compensation under the partnership of acquets⁵³⁶, the procedures provided in connection with the legal regime are superior to those applicable under the community.

273. Compensation owed by the community to either spouse is made by way of pretaking⁵³⁷, bearing in mind that the wife is given precedence⁵³⁸. On the other hand, when compensation is owed by one spouse to the community, article 1355 provides that the spouses or their heirs must make a return to the community. As in the case of successions, these returns may be made by taking less, in kind or by pretaking⁵³⁹. However, the advisability of using either of these methods of returning to the community the compensation owed by the spouses depends on the composition of the community and the compensation owned by each spouse. Moreover, we must point out that no set-off is allowed for the compensations owed by each spouse to the community since the spouses are not debtors or creditors of each other. Each may be a debtor or creditor of the community, but not of his spouse⁵⁴⁰.

Thus, in the case where the wife has no claim against the community and the husband owes compensation to the community which is sufficiently large, a return by taking less may be the most appropriate method⁵⁴¹. On the

other hand, a return by taking less will not be possible if the spouse's debt is greater than his share in the community; there must then be a real return, at least in part⁵⁴². However, authors unanimously⁵⁴³ state that when both spouses owe compensation to the community and the latter also owes compensation to the wife, a real return will always be to the advantage of the husband because of the right given to the wife to pretake out of the private property of the husband where the community proves insufficient⁵⁴⁴. In such cases, the husband may safeguard his private property if he manages to prevent insufficiency of the community. Furthermore, article 1304 provides that such compensation may also be made by pretaking: a sum equal to what is owed by the other spouse in compensation may be pretaken out of the property of the community⁵⁴⁵.

Finally, we must point out that article 1360 provides that, in all cases of compensation or reprises, the sums owed by the community to a spouse or by one of the spouses to the community bear interest by law, from the day of the dissolution of the community.

274. Once these operations have been completed and static balance thus achieved, the property remaining in the community must be divided. We must now consider the dynamic balance.

Paragraph III

Establishing dynamic balance

275. The principle of dynamic balance between the consorts is expressed in article 1361 as follows: "After the pretakings have been effected and the debts have been paid out of the mass, the remainder is divided equally between the consorts or their representatives". Thus the common property will be divided so as to ensure that the spouses or their representatives participate in the patrimony which grew during the regime. However, only the "real" common property will be divided, since the establishment of the static balance requires the withdrawal from the community of all property that may be accidentally included in it as well as the payment of all common debts. In considering dynamic balance, we must first examine the spouses' rights at the time of partition and then, the rights of creditors after partition.

A. The spouses' rights at the time of partition

276. Partition between the spouses and partition between one consort and the other's representatives is not effected in the same manner; we must therefore examine these cases separately.

1. Partition between the spouses

277. Article 1361 states that partition is effected in equal shares between the spouses. For the moment, we shall disregard partition between one spouse and the other's representatives. Article 1363 refers to the rules established in the title "Of successions" for partition among coheirs in all that regards the forms, the licitation of immoveables, the effects of the partition and the payment of differences; we will not examine these rules, although we should know that they apply. We point out that we shall not concern ourselves with such technical details, but that it would be a mistake to assume that they can be disregarded.

Partition between the consorts is ordinarily made in equal shares, with one exception: the case where a consort has abstracted or concealed certain property. In such a case, article 1364 provides that a spouse who has abstracted or concealed property forfeits his share of the property abstracted or concealed. In this regard, the Quebec Court of Appeal has held, and its decision was approved by the Supreme Court, that failure by a spouse to declare certain property in his possession for purposes of an inventory, does not constitute concealment when this property was known to the other spouse who signed the inventory⁵⁴⁶. The omission must be accompanied by wrongful intent to be regarded as concealment⁵⁴⁷. However, if abstraction or concealment is proved, or if it may easily be deduced from the spouse's actions, or from the value of the property concealed⁵⁴⁸, then, the penalty is imposed and the spouse who has acted in this manner will be obliged to return such property to the community, thereby losing his or her share of it. The law thus imposes on the spouse who has concealed property the same treatment he sought to impose on his spouse.

Save the case of concealment, partition between the spouses will be effected in equal shares. However, when partition is made between the surviving spouse and the heirs of the predeceased spouse, the shares may be unequal.

2. Partition between the surviving spouse and the heirs of the predeceased spouse

278. In spite of the principle of equal partition of the community, when partition must be made between the surviving spouse and the heirs of the predeceased spouse, the surviving spouse may, as a result of a decision by one or more of the heirs, receive or retain a share greater than half of the community.

However, it would appear that article 1362 applies only to partition between the husband and the heirs of the wife when the community is dissolved by the wife's death⁵⁴⁹. Consequently, unequal partition between the surviving spouse and the heirs of the predeceased spouse may occur only

when the survivor happens to be the husband. In such a case, if some of the wife's heirs accept and the others renounce, the share of those who renounce cannot increase that of those who accept, as they may take only the share they would have been entitled to if all had accepted. The share of those renouncing reverts to the husband. At first, there seems to be a contradiction between the provisions of article 1362 and article 649, for with respect to the community, each of the heirs may accept or renounce it, whereas with respect to a succession, their heirs of the person to whom the succession devolves must accept or reject it as a group. There is in fact no contradiction since under article 1362, the right to accept or renounce the community is exercised at the time of the death of the wife, whereas under article 649, the right to accept or reject the succession belongs to the person entitled to inherit, an indivisible right which is passed on to his heirs at his death⁵⁵⁰.

Furthermore, we learn from the second paragraph of article 1362 that if the contract provided that, in the event of renunciation, the wife would be entitled to certain property, then, if the heirs renounce the community, they will retain these rights but only to the extent of the hereditary share of each heir who has renounced.

Once partition is completed in accordance with the general rule or its exceptions, the effects of the regime do not vanish completely since the Code also makes provisions concerning debts outstanding after dissolution.

B. The right of creditors after partition

279. After partition, there may be debts for which the community is not liable, but which are nevertheless regulated by the Code, and debts for which the community was liable before dissolution with respect to which the Code establishes the rights of creditors and those of the spouses. The first case involves claims between the spouses or between one spouse and the other's creditors; and the second case involves claims by third parties.

1. Claims between the consorts

280. Articles 1365 and 1367 provide for cases where one spouse is a personal creditor of his spouse. If the debt is outstanding after partition, the creditor has a recourse against his spouse's property, including the latter's share of the community and his private property. Thus, article 1365, with respect to debts, and article 1367, with respect to gifts made by one spouse to the other, indicate that the claim may not be prosecuted or that the gift may not be taken out of the community. In addition, as opposed to the case of compensation⁵⁵¹, article 1366 specifies that personal claims bear interest only according to the ordinary rules.

Moreover, article 1368 provides that the wife's mourning, which must be set according to the financial position of the husband and which is due to the wife even if she renounces the community, is chargeable to the heirs of her deceased husband.

2. Claims by third parties

281. Articles 1369 to 1378 of the Code regulate, on the one hand, the liability, and on the other hand, the contribution to common debts outstanding after partition.

282. With respect to liability for debts after partition, article 1369 provides that "each consort may be sued for the full amount of outstanding debts that are liabilities of the community attributable to him". On the other hand, article 1370 provides that each consort may be sued only for one half of the debts that are liabilities of the community attributable to his spouse, specifying that a spouse thus sued for debts attributable to his spouse may avail himself of the privilege of emolument, provided a good and faithful inventory has been made. Thus, the creditors of the community still have a recourse after partition against the entire patrimony of their debtor; indeed, we should remember that, in addition, the second paragraph of article 1425e gives creditors the right to proceed against the reserved property and that they retain this right even when the wife has renounced the community in order to keep her reserved property⁵⁵². With reference to the hypothesis under study, if there was partition of the community, any existing reserved property was included in the community.

283. Furthermore, the criteria laid down by the Code with respect to contribution to debts are comparable to those provided with respect to liability for debts. Article 1371 provides that the spouses contribute for one half to debts for which no compensation is owing, as well as to the expenses of seals, inventories and other necessary expenses of partition. However, the second paragraph of this article provides that debts which became liabilities of the community subject to compensation by one spouse are entirely borne by the latter. Article 1372 further provides that the privilege of emolument provided for under article 1370 with respect to liability applies to contribution as well, unless the spouse who seeks to avail himself of this privilege owes compensation for such debts. However, article 1373 specifies that if a spouse has paid a portion of a debt greater than that for which he was bound, he has no recourse against the creditor, unless the spouse had stated in the receipt his intention to pay only to the extent of his liability. Nevertheless, the spouse who has thus paid beyond his liability is provided a recourse against his spouse by the same article.

In fact, there is an exact parallel between liability and contribution to debts after partition since each spouse is bound for all the debts which became liabilities of the community attributable to him and since each spouse

is bound to pay half of the common debts for which no compensation is due, however, only to the extent of the benefit he derived from the community.

Moreover, one spouse always retains a right of action against the other if he has paid a portion greater than that for which he was bound. This recourse is also provided by article 1376 in a case where a spouse has had to pay the mortgage on an immovable which has fallen in his share of the community. The spouse then has a recourse against the other spouse or the latter's heirs for half of the debt thus paid. We should also note that, according to article 1378, the spouses' heirs have the same rights and are subject to the same obligations as the spouse they represent.

Finally, article 1377 of the Code provides for partition clauses establishing different criteria respecting contribution to debts as long as the rights of creditors are not adversely affected. We thus observe that the regulation of the Code respecting the rights of creditors after partition is not a matter of public record.

Conclusion of Chapter

284. In this chapter we have studied the community of moveables and acquests from its beginning to partition and even beyond partition if the provisions of the regime continued to apply. We have on occasion pointed out the complexity of this regime, which is quite different from that of the partnership of acquests. In fact, the complexity of the community is the consequence of the joint application of principles and techniques which may in themselves be contradictory.

For example, the classification of property still preserves the anachronistic value judgment formerly attached to moveables, and it must consider both the date of the beginning of the regime and the moveable or immoveable nature of the property in question. Similarly, a further consideration applies when the property is received by gratuitous title, for it may be private or common property depending on whether such property is moveable or immoveable; in addition to these criteria, classification must also consider the origin of the property, for it differs depending on whether the property is received by gratuitous title from ascendants or from other persons.

Furthermore, with respect to administration, the joint application of absolute techniques of subordination of married women and techniques of coordination between the spouses results in the impossibility of referring, when in doubt, to the general regulation of the regime in this respect. Consequently, in order to correct an unbalanced situation in favour of the husband,

the legislature created a further unbalanced situation, this time in favour of the wife.

This joint application also has consequences for partition; we find it difficult to understand why the present regulation of the regime does not give the husband the right to renounce the partition of the community when his powers of administration of property have been reduced. Furthermore, and this is even more striking, it is hard to understand why only the wife, or her heirs, have the power to determine the fate of the reserved property when the wife is solely responsible for its administration.

Finally, criticism may be directed at the fact that the Civil Code Revision Office has not recognized the need to fundamentally restructure the community, and at the fact that the reforms have involved mere tinkering rather than clear improvements, and this has raised difficulties in the present situation. If the Office wished to restore the image of the community, it should have simplified the regime by removing needless complications and it would probably have had to choose between techniques. How has the legislature dealt with other modifications to the community? We will examine this matter in the next chapter.

Chapter II

The Principal Modifications to the Community of Moveables and Acquests

285. Since its promulgation, the *Civil Code* has regulated modifications to the community of moveables and acquests. The last reform of matrimonial regimes made only minor changes to the clauses modifying the community, even though the legislature finally rectified the contradiction of regulating the separation of property among these clauses⁵⁵³. This section of the Code⁵⁵⁴ regulates only the principal modifications and does so only insofar as they modify the community of moveables and acquests. Indeed, article 1413 stipulates that the rules of the community of moveables and acquests apply in all cases where they have not been explicitly or implicitly derogated from by the contract establishing another kind of community.

Furthermore, article 1384 provides an analytical list of the principal modifications. They may be grouped under three headings: modifications acquests apply in all cases where they have not been explicitly or implicitly ities⁵⁵⁶ and modifications affecting partition⁵⁵⁷. We will examine them under these three headings.

Section 1

Modifications affecting the assets of the community

286. Although the Code regulates four types of clauses that may modify the assets of the community, they may be reduced to two types: clauses reducing the property of the community and clauses increasing the property of the community.

Paragraph I

Clauses reducing the property of the community

287. They are, on the one hand, the community restricted to acquets introduced into the Code in 1931, which always reduces the composition of the assets of the community; and on the other hand, the clause of realization, which has been in our Code since it was promulgated and which originates in the old law⁵⁵⁸; this clause also always reduces the assets of the community, although the property excluded from the community will depend on the contract.

288. In the case of the community restricted to acquets, article 1389a provides that when it is adopted by contract, the spouses are deemed to exclude from the community all the property and debts existing at the date of the marriage. Thus, in this respect, the community of acquets resembles the partnership of acquets. The reduction of the assets by excluding all property existing before the marriage also involves the reduction of the liabilities by the highly logical corollary exclusion of all debts existing before the marriage. However, the wording of this article, and particularly that of article 1389b, suggests that they were drafted with the distinction between moveables and immoveables in mind. In fact, as opposed to the presumption of acquets of article 1266m which applies to all property, the presumption stated in article 1389b relates only to moveables. Because of this last presumption applying only to moveables, the result may in fact be a community of moveables and acquets.

Nevertheless, the principle stated in article 1389a still applies: only acquets will be included in the mass for partition. The 1931 commissioners thus sought to better adapt the community to the needs of their time, but maintained that it could only be adopted as a conventional regime⁵⁵⁹. This form of community has remained unchanged since then.

289. Moreover, the legislature has never fundamentally altered articles 1385 to 1389, in spite of the minor amendment made to the latter articles for the sake of agreement at the time of the last reform. Thus, the realization clause enables the parties to partially or totally exclude their moveables from the community. This clause, defined in article 1385, may be applied in two ways: the spouses may, by the realization clause, exclude from the community all or part of the moveable property owned by them before the marriage; however, they may also do this by expressly including a portion of their moveable property in the community, the remainder being thus excluded. In the last case, articles 1386 to 1389 lay down the various necessary procedures relating to contribution and its substantiation, pretakings and property received during the marriage.

290. It is easy to observe that this realization clause may coincide with the community of acquets. Indeed, if it is total, if it excludes from the community all the moveable property owned by the spouses before the marriage,

the result is the same as under the community of acquests. Of course, if the spouses wish to exclude only part of their moveables by this clause, then a distinction does exist between the realization clause and the community of acquests. However, in our opinion, this distinction is not sufficiently significant to warrant special regulation in the Code. We feel it would have been preferable to retain only the community of acquests, extending its regulation to permit the spouses to include certain property in the community. It might not have been necessary to indicate the realization clause explicitly in retaining the presumption of acquests. Thus, these two modifications, which may, for all practical purposes, be regarded as one, tend to reduce the assets and liabilities of the community. However, certain other clauses increase the composition of the community.

Paragraph II

Clauses increasing the property of the community

291. Here again, the Code provides for two possible modifications to the community increasing its composition: the general community, or community by general title, and the mobilization clause.

292. Article 1412 permits the spouses to adopt by contract the general community or community by general title. This article considers several alternatives: the spouses may stipulate a general community of all their property or either of the communities by general title. The article mentions only two kinds of community by general title: all present property, or all future property. However, we see nothing to prevent their adopting a community by general title of immovables or of moveables, present or future, or any other type of general community. Although the Code makes no express provision regarding debts, they will ordinarily follow property, subject to article 1413. Furthermore, if the community is general, in theory, the only private property that can subsist will be that received with a stipulation of private ownership.

293. The mobilization clause, which also originates in the old law⁵⁶⁰, clearly overlaps the general community or community by general title. According to article 1390, both or either of the spouses may, by virtue of the mobilization clause, bring into the community all or part of their present or future immovables. The mobilization may be general or special⁵⁶¹, determinate or indeterminate⁵⁶². Articles 1392 and 1394 contain provisions regarding the effect of mobilization upon the administration and ownership of such mobilized immovables, and article 1392 confers certain rights at the time of partition on a spouse who has contributed his immovable as moveable. Of course, here again, there are minor differences between the mobilization clause and the general community or community by general title, but we

believe that these differences do not warrant the number of articles in the Code devoted to the mobilization clause.

294. Our rejection of the realization and mobilization clauses is very likely due to the antiquated character of their technique. We see no point in resorting to fiction in order to reduce or increase the composition of the community. In both cases, it is clearly fictitious to say that a moveable becomes an immoveable, or vice versa, for the purposes of the community. Furthermore, because these clauses embody the formerly accepted value judgment on moveables—*res mobilis*, *res vilis*—and because this value judgment no longer reflects reality, we feel that the legislator ought to have fundamentally altered the clauses modifying the composition of the community.

Section 2

Modifications affecting the liabilities of the community

295. The Code contains only one paragraph dealing with modifications to the liabilities of the community: it relates to the clause of separation of debts. Nonetheless, although the Code treats the subject under a single clause, three different matters are dealt with in articles 1396 to 1399: the clause of separation of debts, properly speaking⁵⁶³, the contribution clause⁵⁶⁴, and the free and clear clause⁵⁶⁵. Ordinarily, all three cases relate to debts existing prior to the marriage, which should make up the liabilities according to the general rules of the community.

296. The clause of separation of debts, properly speaking, is regulated under article 1396. It is a stipulation by which the spouses agree to pay their personal debts separately. In such a case, the article provides that, at the time of dissolution, the spouses must “account to each other respectively” for any personal debts paid by the community. The article also provides a recourse for creditors. When such a stipulation is made, the principle of the article requires that each spouse remain solely responsible for his personal debts, with respect to liability as well as contribution, and consequently, if the creditors proceed against the community, the spouse owes compensation.

297. The contribution clause, covered by article 1397, applies when one of the spouses brings “a certain sum or a determinate object” into the community. Such a clause implies a tacit agreement that the property is free of encumbrances. The other spouse reserves the right to claim compensation for debts attaching to such property which have been paid by the community, for such debts effectively reduce the contribution. However, article 1398 stipulates that the community may assume the interest and arrears of such debts which have accrued since the marriage.

298. The free and clear clause, covered by article 1399, is only a statement made by one spouse, or by a third party for the benefit of one spouse, to the effect that the latter has no debts prior to the marriage. In such a case, if the spouse who claimed to be free and clear of all debts proves to be indebted, and his debts are paid by the community, it will be entitled to compensation which may even be claimed, in the event of insufficiency, from the parties who guaranteed the statement that the spouse was free and clear.

299. The regulation relating to the modifications affecting the liabilities of the community, in addition to its use of antiquated terminology, is overly analytical, emphasizing once again the excessively “casuistic” character of the community.

Section 3

Modifications affecting the partition of the community

300. In spite of the rule of equal partition of the community, the Code provides that the spouses may stipulate a different partition; it also provides that the wife may be permitted to take back her free and clear contribution, and allows the spouses to stipulate a conventional preciput.

301. Articles 1406 to 1411 lay down the rules according to which unequal shares in the community may be assigned to the spouses. Article 1406 indicates several such possibilities: by stipulating that a spouse will be given a share less than half; that one spouse may be given a fixed sum in lieu of all rights in the community; and that the entire community will belong to the surviving spouse, or to only one of them. Of course, in such cases, the contribution to debts is proportional to the share received⁵⁶⁶; any stipulation altering this rule of proportionality between the assets and the liabilities is void⁵⁶⁷. Furthermore, if a fixed sum is stipulated in lieu of all rights in the community, article 1408 provides that the other spouse will be obliged to pay such sum, irrespective of the composition and value of the community. If it was stipulated that the widow may retain the whole of the community under certain conditions, she is still entitled to renounce⁵⁶⁸.

We thus observe that the rule of equal partition of the community is not an absolute rule. It will also be noted, however, that the criterion of proportionality between the assets and the liabilities at the time of partition is an unvarying rule. The Code also prescribes that a stipulation giving the surviving spouse the whole of the community is a marriage covenant, not a gift⁵⁶⁹.

302. Furthermore, in the case of renunciation of the community, article 1400 gives the wife the right to take back the property she brought into the community free and clear of all debts. However, the wording of the

article itself indicates that such a clause must be given a restrictive interpretation: she may only take back the property that is formally specified in the clause.

303. Finally, articles 1401 to 1405 govern conventional preciput. This is a clause which generally applies only in the event of dissolution by death⁵⁷⁰, and which is intended to enable the surviving spouse to pretake, before any partition, a certain sum or certain moveable effects⁵⁷¹. However, save an express provision in the marriage contract, the widow may pretake only when she accepts the community⁵⁷², and (again save an express provision to the contrary) preciput may only be taken from the common property⁵⁷³. The Code also specifies that such a case is not regarded as a benefit subject to the formalities of gifts⁵⁷⁴. Furthermore, article 1405 stipulates that the creditors of the community have always a right to cause the effects included in the preciput to be sold, saving, of course, the recourse available to the consort under article 1401.

Conclusion of Chapter

304. The section of the Code regulating the principal modifications to the community of moveables and acquests ought to have been restructured along more rational lines in the last reform. In fact, except for the title of the section and certain very minor changes, the legislature has left it almost as it was when the Code was introduced. Although the changes made have been mainly from the point of view of terminology, it would appear that all the necessary changes in this respect have not been made. This section still contains antiquated aspects with respect to its substance as well as its form.

Indeed, this section of the Code, more so than the community of moveables and acquests, is based on a number of obsolete principles that ought to have been eliminated. There can be no doubt that a restructuring in line with more modern concepts would have greatly simplified it as well as made it more flexible and realistic.

Conclusion of title

305. The major criticism that can be made with respect to regimes based on the partition of property using subordination techniques is precisely with regard to these techniques which are rejected by contemporary society. Nevertheless, though this is the major criticism, it is not the only one. The fact

that these regimes maintain principles which were generally accepted in ancient law, such as keeping immoveables in the direct line of descent, but which no longer seem to correspond to social conditions, is also a significant shortcoming. The "casuistic" character of the regulation is also open to criticism. Naturally, any regulation must be concerned with a variety of details, but it might have been preferable to reduce the complexity of these regimes somewhat, when such complexity is not required by the circumstances.

However, these regimes have one very positive aspect: the partition of property at the time of dissolution. It is precisely this fundamental characteristic that differentiates them from regimes based on independent patrimonies.

PART THREE

Regimes Based on Independent Patrimonies Using Coordination Techniques in Quebec

306. In Quebec, regimes based on independent patrimonies always apply techniques of coordination between consorts; we are concerned here with the regime of separation of property. It may be preferable, however, to talk of regimes of separation of property rather than of the regime of separation of property; such a distribution could fully apply to the separation of property adopted as a conventional regime, but the situation would be different in the cases of judicial separation of property. However, we are faced in both cases with a regime based on independent patrimonies using coordination techniques.

307. At the time of the last reform, the Quebec legislature prescribed a special chapter in the Code for separation of property⁵⁷⁵ where it regulates at the same time the conventional separation of property and the judicial separation of property. It thus grouped under a single heading provisions which, previously, could be found within the regulations of the legal community⁵⁷⁶ or within the clauses which may modify that community⁵⁷⁷. In briefly commenting on that reform of matrimonial regimes, we had stated that this grouping of the conventional separation and judicial separation under the same heading was questionable⁵⁷⁸ even though, in studying the 1964 reform, we had made such a grouping in the context of immutability that prevailed at the time⁵⁷⁹, for at that time, such a grouping could be centred on the effect achieved in both cases: the separation of property. However, in the context of mutability prevailing since 1970, the judicial separation of property can be considered as another means of changing the matrimonial regime. It can even be said that judicial separation of property was incompatible with the previous principle of immutability⁵⁸⁰. Consequently, we remain convinced that the judicial separation of property should have been regulated in parallel with the regulation relating to the conventional

change of matrimonial regimes. Of course, the field of application of the conventional change of matrimonial regime or marriage contract is wider than that of the judicial change of certain matrimonial regimes; besides, the fundamental and procedural conditions are also different in both cases and, finally, the effect of each of these changes is not identical. However, in spite of these differences, the judicial separation of property is but one modality of the mutability of matrimonial regimes. The introduction of the principle of mutability of matrimonial regimes at the level of the second draft of the Revision Office has probably resulted in our Code being outdated in this area.

308. We will successively look into the conventional separation of property in the first title, and the judicial separation in the second title.

TITLE I

THE CONVENTIONAL SEPARATION OF PROPERTY

309. This separation of property can only become the spouses' matrimonial regime when they have adopted it in their marriage contract⁵⁸¹ in the manner prescribed by the Code⁵⁸². The Code establishes the general framework of that regime in its regulation but, in order to study the conventional separation, we must also consider the palliatives of the absolute independence of patrimonies, which the spouses may adopt by agreement.

Chapter I

The Regulation of the Separation of Property

310. The regulation of the separation of property relates to the two fundamental aspects of the regime: the independence of patrimonies and the effect of marriage upon property. Indeed, even though we are concerned with a regime based on independent patrimonies, the legislative at least had to provide for the effect of marriage upon the satisfaction of vital family needs, which is considered by some to be the element which makes it possible to state that the separation of property is truly a matrimonial regime⁵⁸³.

Section 1

The independence of patrimonies

311. Article 1437 of the *Civil Code* is very clear in this respect: "Under the regime of separation of property, each consort has the administration, enjoyment, and free disposal of his property both moveable and immoveable". Although the Code is not explicit with respect to debts, it is obvious that there is independence with regard to property as well as with regard to debts.

The separation of property has once been wittily described as a regime under which the spouses marry, but their property remains unmarried. This statement, like any sally, is in the nature of a caricature. As a matter of fact, each spouse has complete control over all of his property as well as absolute liability for his debts, but marriage nevertheless has an effect, however small, upon their patrimonies.

Consequently, it is appropriate to state that the spouses generally act as single people with respect to their property and debts, even though that statement only emphasizes the absence of limitations, as a rule, with respect to the administration and the free disposal of property. However, where enjoyment is concerned, it is obvious that at least part of their property will, in fact, be set apart for the family. Nevertheless, it can be said more accurately that the property and debts will not be affected in any way at the time of the dissolution of the regime, and that the separation of property, based on the independence of patrimonies, does not acknowledge the contribution of a spouse to the growth of the other spouse's patrimony. Thus, the independence of patrimonies is more evident at the time of the dissolution of the regime than during the regime, even though total independence only occurs in cases of pure and simple separation. The Code also provides for the effect of marriage upon the consorts' property.

Section 2

Effect of marriage upon property

312. The Code acknowledges such an effect by first providing for the proportional obligation to contribute to the needs of the family, and secondly, by establishing a presumption in order to solve the problems which may arise at the time of dissolution due to the possible confusion of the spouses' property during their marriage.

Paragraph I

Contribution to the needs of the family

313. Article 1438 gives the spouses the right to determine their contribution to family needs by covenant, specifying that, in the absence of covenants, the consorts shall contribute in proportion to their respective resources. The article also specifies that in case of disagreement between the spouses, the court may, on the motion of either, determine the contributory share of each.

314. First of all, one may question the scope of the covenant, although the only possible source of difficulty is that of determining whether one spouse may, by covenant, be totally exempted from contribution. As a matter of fact, contracts of separation of property quite often contain a clause imposing household expenses on the husband. Mignault⁵⁸⁴ and Faribault⁵⁸⁵

find no objection to the inclusion of such a clause; they also point out that, in such case, the wife may not be held liable for household debts by neither the creditors nor the husband. Because the context was different at the time they were writing, they make no mention of the validity of a clause stipulating that the wife alone shall assume the household expenses. Furthermore, it has been stated, in a judicial context similar to ours, "that a clause exempting one of the consorts from any contribution would be contrary to the concept of cooperation between consorts which is a fundamental element of contemporary marriage and would therefore be void"⁵⁸⁶. We share that view. We would also gladly accept the validity of a clause stipulating different methods of contribution and imposing on the husband, or on the wife, the exclusive obligation to contribute with money while the other spouse contributes with his or her work, for then the question would not be to completely exempt one consort from contribution, but rather to recognize different methods of contribution.

Besides, considering our present judicial context, we believe that a spouse cannot be totally exempted from contribution. Indeed, in spite of its unilateral wording, article 174 seems to impose on both spouses the obligation to ensure the physical needs of the family in a chapter that could be compared to the primary regime, at least with respect to its effects. Furthermore, in spite of the covenant, the spouses are still responsible for the maintenance of their children⁵⁸⁷. Of course, these provisions exceed the regulation of the matrimonial regimes and, if need be, it could be said that the clause exempting one of the spouses from contribution to family needs could be valid subject to the provisions of articles 165 and 174. We think that it would be more in accordance with the present regulation to consider that the spouses may, by covenant, determine their contributory share, inasmuch as neither of them is fully exempt, even if contribution is made in different ways.

315. The other important question raised with respect to the spouses' contribution to family needs under the separation of property is that of the effect of the legal mandate of article 180 upon the rule of proportional contribution established under article 1438.

316. We have already examined the legal mandate in a general way⁵⁸⁸; its effect under the separation of property seems, at first, to contradict the rule of proportional contribution established under article 1438, since according to article 180, the husband alone is bound towards third persons. However, upon closer examination, we realize that the legal mandate only regulates the recourse available to creditors. Consequently, it would seem that the effect of the mandate should be limited to such recourses. Yet, under the separation of property, jurisprudence has more readily excluded the household or legal mandate, on the basis of contractual liability⁵⁸⁹. It can be said "that jurisprudence in Quebec reduces the problem of liability for debts to determining whether credit was given to the husband or the wife. The husband shall *a priori* be considered as the only debtor; however, should

it be established that credit was given to the wife, the creditors must claim from her and logically from her alone”⁵⁹⁰. As a matter of fact, in 1878, Justice Dorion formulated the questions that led to the establishment of the criterion of contractual liability with respect to family needs as follows: “Will the wife married separate as to property who lives with her husband and purchases goods from a supplier for the needs of the family, be held personally liable for the whole or for some part thereof on the sole basis that she made the purchases? *That is a question of fact*. Did the wife purchase in her own name? Were the purchases entered in her account in the supplier’s books? *In short, was credit given to her or to her husband?*”⁵⁹¹. This criteria was subsequently applied by an abundant and almost consistent jurisprudence⁵⁹². We may therefore conclude that the effect of the legal mandate will depend on contractual liability under the separation of property and that, consequently, its effect may be less pronounced than under the other regimes.

However, “the manner in which the Quebec courts have approached and solved the question of the liability for household debts of consorts married separate as to property, shows that a very individualistic idea of that regime was adopted. To reduce the problem to a matter of contractual liability, to the question of determining whether the creditors agreed to give credit to the husband or to the wife, is to practically consider the consorts as strangers to one another, to forget that they live together and that they have started a family”⁵⁹³. Thus, because of the jurisprudential interpretation, this aspect of the effect of marriage upon property, notwithstanding the provision of article 1438, would become a confirmation of the independence of patrimonies. However, the legislature has also made provisions for the partition of certain property at the time of dissolution, should the owner not be identifiable at that time, namely in the case of undivided property.

Paragraph II

Undivided property

317. Article 1439 provides: “Property with respect to which neither consort can establish an exclusive right of ownership is deemed to be held in undivided ownership one half by each”. Thus, the Code clearly acknowledges, like the French Code⁵⁹⁴, that it is almost impossible to have a marriage without the latter affecting property and thus introduces a dynamic element at the time of the dissolution of the regime. Indeed, this article is not concerned with property the owner of which is identified by name, such as immoveables, registered moveable property (boats, automobiles, certain company shares), but it applies to moveables such as the household furniture, joint bank accounts, safety deposit boxes in the name of both spouses, bonds or shares

payable to bearer that could be found either in the house or in a joint deposit box. Consequently, in these cases, the Code establishes a presumption which will permit the partition of such property that will have been merged during marriage. The dynamic element is not, as a rule, very important, but it may be extensive in specific cases. Thus, even with respect to the regime purely and simply, the legislature felt the need to recognize the effect of marriage upon property, thus mitigating the independence of the patrimonies somewhat. However, the parties may, in their conventional regime, bring other important palliatives to the independence of patrimonies.

Chapter II

Conventional Palliatives to the Independence of Patrimonies

318. The spouses may include in their marriage contract of separation of property clauses mitigating the independence of patrimonies, which is the basis of that regime. Historically, these clauses contained dispositions by gratuitous title sometimes made in favour of the wife and sometimes in favour of the surviving spouse. In the first case, the husband benefited his wife in consideration of her renunciation of the legal regime of partition of property and of the dowry. Today, it is still by way of dispositions by gratuitous title that the consorts mitigate the principle of independence of patrimonies, namely by way of gifts *inter vivos*, gifts made in contemplation of death or the conventional appointment of an heir. It is obvious that we are unable to make a complete study of gifts by marriage contract within the framework of this paper⁵⁹⁵; we will only point out the most important consequences of such dispositions by gratuitous title in the context of the matrimonial regime of separation of property.

319. Before considering these consequences, we wish to point out that the importance formerly given to gifts by marriage contract could decline as people become aware that, since July 1st, 1970, spouses may make gifts to each other *inter vivos*. Indeed, before the *Act respecting matrimonial regimes* came into effect, consorts were prohibited from making gifts to each other *inter vivos*⁵⁹⁶; however, such gifts were permitted by marriage contract⁵⁹⁷. Therefore, spouses who wished to mitigate the strict independence of patrimonies *inter vivos* necessarily had to proceed by way of gifts in their marriage contract. The legislature having amended the *Civil Code* in this respect⁵⁹⁸, spouses may now consider the possibility of making gifts to each other on occasion instead of including them in their marriage contract. However, even though spouses are now permitted to make gifts to each other, we

must also point out that they may prefer a gift clause in the contract to a future gift, for even if the clause included in the contract contains a gift of a value less than that which could eventually be received, it is always possible to consider that "a bird in hand is worth two in the bush".

320. Furthermore, still considering the situation before July 1st, 1970, the gift clause included in the marriage contract had the same characteristics as the immutability of matrimonial regimes and, consequently, the spouses could not change it after the marriage. Due to the close relationship between the prohibition of gifts made *inter vivos* and the principle of immutability of matrimonial regimes⁵⁹⁹, it is logical for the legislator to have modified both the prohibition and the principle. Consequently, under present legislation⁶⁰⁰, with the consent of all interested parties, spouses may modify gifts contained in their marriage contract⁶⁰¹. Therefore, it would seem that such gifts could lose some of their importance, even though the donee will usually prefer to include them in the marriage contract, for then, no modification can be made without his consent.

321. Thus, the dispositions by gratuitous title in marriage contracts remain quite an effective way of mitigating the strictness of the independence of patrimonies, while giving assurance and control to the donee. However, the palliatives that may be included in marriage contracts are very much different from the participation in the growth of the patrimony recognized under regimes based on the partition of property. In these regimes, each spouse has a right originating with the beginning of the regime and taking effect at the time of dissolution, but this right is exercised on the spouse's patrimony or on the common patrimony as they exist at the time of dissolution. On the other hand, the palliatives to the regime of separation of property by way of dispositions by gratuitous title usually relate to property or a sum of money predetermined at the time of the contract, and save a testamentary clause giving the property to the last survivor, the amounts of gifts are determined regardless of the growth of the donor's fortune during the marriage. Furthermore, such gifts may take effect during the marriage or they may only be exigible at the time of the donor's death. Thus, with respect to gifts exigible at the time of the donor's death, should the courts decree the severance of the conjugal bond, such gifts may not be claimed and may even be declared forfeited. Gifts exigible *inter vivos* may also be declared forfeited at the time of a separation from bed and board or divorce⁶⁰².

For the purpose of our study, we see no purpose in considering gifts with respect to the situation of the property at the time of the marriage contract, we deem it more useful to consider gifts from the point of view of their exigibility for it is at the time of the transfer of property from the donor's patrimony to that of the donee that dispositions by gratuitous title may have an effect upon the independence of patrimonies. Therefore, we will examine gifts *inter vivos* in the first section, and in the second section, we will examine dispositions by gratuitous title exigible at the time of death.

Section 1

Gifts *inter vivos* by marriage contract

322. At the time a contract of separation of property is drawn up, the husband usually gives his wife the household furniture, the family home and, often a sum of money. Furthermore, in many cases, the husband does not possess the property he is giving at the time the deed is drawn up. Such a gift of future property, even though it is void in a general way⁶⁰³, is allowed when made by marriage contract⁶⁰⁴. However, for such a gift to be exigible *inter vivos*, it must meet the conditions prescribed and, more especially, the donor must actually divest himself of his ownership in the thing given⁶⁰⁵, which, in the case of future property, takes place when the donor binds himself towards his wife, thus becoming her debtor⁶⁰⁶.

Thus, the principle is quite clear; if present property is given and the donor has actually divested himself of his ownership therein, it will be *inter vivos*; however, the exigibility of the gift by the donee may depend on the terms of the contract, for the donor could, at the same time as he divests himself of his title of ownership, set either a maximum or minimum term for the execution of the gift; he could even stipulate that the gift will only take effect at the time of his death⁶⁰⁷. On the other hand, if future property is given, the donor must make himself the donee's debtor for the gift to be considered *inter vivos*. Furthermore, in this case, the wording of the contract must be taken into consideration so as to determine whether the donor has expressed his will with respect to the time of the execution of the gift.

Therefore, with respect to such gifts, we must consider their exigibility during the marriage on the one hand, and on the other hand, their exigibility at the time of the termination of the marriage.

Paragraph I

Exigibility of gifts during the marriage

323. In this respect, we are mainly concerned with the wording of the clauses in the contract; indeed, jurisprudence has continued to transcribe and interpret these clauses so as to determine whether the donor has divested himself of the property given on the one hand and, on the other hand, whether the donor has delayed the effect of his gift to the time of his death. If both conditions are met in each of the cases, then the donee—usually the wife—is considered to be the owner of the property given. However, the donor could actually divest himself of the property given at the time the deed is drawn up and bind himself to fulfil his obligations within a delay of a few years.

In addition to these general notions, it would be hazardous to make an analysis of jurisprudence here, since, actually, each ruling attempts to determine whether the necessary conditions are included in the clause. If they are, the property is deemed to belong to the wife⁶⁰⁸; in the other cases, the courts attempt to determine whether the gift is made in contemplation of death or made exigible at the time of death.

Nevertheless, even in the case of gifts *inter vivos*, if the donor bound himself to execute the gift within a maximum delay of a certain number of years, the marriage could end before the completion of this delay.

Paragraph II

Exigibility of gifts at the time of the termination of marriage

324. The termination of marriage does not, in itself, bring about the exigibility of the gifts. Indeed, article 208⁶⁰⁹ provides that “separation from bed and board carries with it separation of property; divorce carries with it dissolution of the matrimonial regime”. This article also regulates in its second paragraph that two means of terminating marriage “give to each consort the right to demand the execution of the gifts *inter vivos* made to him by marriage contract and which have *become exigible*”⁶¹⁰. Therefore, it is clear that exigibility is not a consequence of the termination of marriage. The spouse can demand the gift *inter vivos*, if it is exigible, according to the terms of the contract, at the time of the separation from bed and board or divorce. Thus, hypothetically, if the husband makes a gift to his wife meeting all of the conditions of a gift *inter vivos*, exigible after ten years of marriage, the wife may claim it if separation from bed and board is pronounced after ten years, for then the gift would have become exigible. On the other hand, in the same hypothesis, she may not claim it if the separation is pronounced after eight years of marriage.

325. However, even though the gift had become exigible, the last sentence of the second paragraph of article 208 stipulates: “unless the court decides otherwise, either to defer payment thereof or to reduce the same or even to declare them forfeited”⁶¹¹. Thus, the legislature gives the court a very wide discretion. It may intervene in order to defer the payment of the gift, either by imposing total payment on the donor at another date, or by allowing him to make the payment by instalments. This discretion of the courts is an exception to the general rule laid down in the title “Of Obligations”⁶¹². Although court intervention is usually considered as the imposition of a penalty⁶¹³, we are inclined to think that intervention

aimed at postponing the payment relates more to arrangements of a pecuniary nature that may be called for at the time of a separation from bed and board or divorce, than to a penalty. As a matter of fact, in exercising its discretion, the court considers it advisable to maintain the gift, while preferring a postponed payment; the donee keeps his right even though the donor is only bound to fulfill his obligation in accordance with the terms of the judgment.

On the other hand, the two other possibilities of court intervention can be considered as penalties. Indeed, the court can reduce the gifts or declare them forfeited. We think that these interventions may always have the characteristics of a penalty imposed on the donee in cases of the regime of separation of property; however, it is possible to consider such court interventions from another viewpoint if the spouses' regime is aimed at the partition of property. In such cases, we believe that the judge's ruling to reduce the gift or declare it forfeited could be considered as a fair way to maintain the regime's dynamic balance. However, this position could only be valid if the courts thus exercise their discretion with respect to the partition of property at the time of the termination of marriage. The courts may base their decisions on the criteria contained in the third paragraph of article 208⁶¹⁴ which mentions "the rank and condition of the parties, their situation when the marriage contract was signed and the circumstances under which it was made"⁶¹⁵. These criteria mostly bring to mind the consorts' economic circumstances. However, this article also mentions "the gravity of the wrongs inflicted by one spouse upon the other"⁶¹⁶, thus relating the court's discretion to the penalty to be imposed on the guilty consort, in order to maintain the gift⁶¹⁷ as well as to exclude it⁶¹⁸.

326. However, the first criterion to be followed in the case of gifts *inter vivos* is, at the present time, that of the exigibility of the gift at the time of the termination of marriage⁶¹⁹. Here again, our courts have paid special attention to the clauses containing the gifts. In some cases, they have considered that the gift was not exigible at the time of the termination of marriage⁶²⁰. In other cases, the courts have decided that the gift was exigible and have maintained it⁶²¹. They have even held that a gift was exigible when the donor had bound himself to execute the gift in an agreement made prior to the separation from bed and board, inasmuch as the donor had reserved himself the right to execute the gift after the solemnization of the marriage by a clause in the marriage contract⁶²².

Thus, with respect to gifts *inter vivos*, in addition to the principles we have stated, the clause or clauses of the contract must always be taken into consideration for, depending on their wording, the gifts may or may not be exigible during the marriage or at the time of its termination. We must now examine dispositions by gratuitous title exigible at the time of the donor's death.

Section 2

Dispositions by gratuitous title exigible at the time of the donor's death

327. Dispositions by gratuitous title exigible at the time of the donor's death are usually called gifts made in contemplation of death or the conventional appointment of an heir, expressions considered to be synonymous at least as to their effect⁶²³. With respect to the effect of gifts upon the regime of separation of property, gifts *inter vivos* subject to execution only at the time of the donor's death by agreement, must also be included under this heading.

These gifts—with the exception of the last type we have just mentioned and which has the characteristics of gifts *inter vivos*—usually relate to future property and the donor does not bind himself to become the owner of the property he is giving; he does not set himself up as his donee's debtor and, in such cases, there is no actual divesting. Then, even though the gift is termed as a gift *inter vivos* in the marriage contract, it is likened to a gift made in contemplation of death, exigible only at the time of the donor's death⁶²⁴, to such an extent that, should the donee die before the donor, the gift shall be considered null and void⁶²⁵. In some cases, when the gifts involved present and future property, judgments have held that, with respect to the future property, the gift was made in contemplation of death⁶²⁶. Furthermore, in the case of gifts made in contemplation of death, the donor's death transfers the obligation to his estate, which must carry it out⁶²⁷.

328. However, the exigibility of the gift at the time of the donor's death is subject to a formality: the registration of the gift before the donor's death⁶²⁸. This registration is required by the Code for all gifts⁶²⁹, those made *inter vivos* as well as those made in contemplation of death, with the exception of gifts made in the direct line of descent by marriage contract⁶³⁰ and gifts of moveable effects followed by actual delivery and public possession by the donee⁶³¹.

We cannot examine, within the framework of this paper, the whole problem of the registration of gifts with respect to which considerable doctrine⁶³² and even more jurisprudence exists⁶³³. In the context of our study, namely considering the gifts as means of mitigating the strictness of the independence of patrimonies under the separation of property, we wish to point out that failure to register gifts may lead to their being unopposable with respect to the heirs and would thus maintain the strictness of the independence of patrimonies.

329. The failure to register gifts is not the only legal circumstance which can lead to the donee being deprived of his gift. Indeed, the third paragraph of article 208 allows the court to intervene in order to declare forfeited the gifts contained in the marriage contract which have not yet become exigible at the time of the separation from bed and board or divorce.

Before this article was amended⁶³⁴, our courts had attempted to find solutions to the problem raised by gifts made in contemplation of death when the consorts had obtained a divorce from the Senate. In some cases, it was held that divorce delivered by the Parliament of Canada had the same effect as death and that, consequently, gifts made in contemplation of death became exigible⁶³⁵. In other cases, on the other hand, with respect to a gift made in contemplation of death, our courts have held that it did not become exigible at the time of the divorce⁶³⁶.

The situation is different since the coming into force of the new article 208. Separation from bed and board or divorce "do not themselves entail nullity of the gifts contained in a marriage contract, (. . .) which have been made in contemplation of death"⁶³⁷. Thus, it is clear that such gifts are not exigible at the time of the termination of marriage. The donor does not lose the benefit of the term, but the donee may be deprived of his gift by the court's intervention⁶³⁸. Indeed, article 208 also gives the court the power to declare forfeited gifts made *inter vivos* which have not become exigible as well as gifts made in contemplation of death. In the last case, we think that the judges may be inclined to use the last criterion established in that article as a guide: "the gravity of the wrongs inflicted by one consort upon the other".

330. Dispositions by gratuitous title exigible at the time of the donor's death can, as a rule, constitute a valid palliative to the independence of patrimonies. However, this conventional palliative to the separation of property may only compare with the dynamic balance of the regime based on the partition of property if the clause contains the conventional appointment of an heir giving the property, or at least, the usufruct of the property to the last survivor. Furthermore, this clause will play a mitigating role only when the marriage is dissolved naturally by the death of one of the consorts, and inasmuch as it has been registered. In all other cases, the donor's rights remain aleatory and the independence of the patrimonies may remain strict.

Conclusion of chapter

331. Thus, by way of gifts contained in the marriage contract, the consorts can fill to a certain extent, the gap created by the conventional separation of property with respect to the growth of each consort's patrimony during the marriage. However, these palliatives are far from an acknowledgement of the effect of marriage upon property. Of course, they permit us to consider the effect of marriage upon vital needs, but they can nevertheless be inadequate.

Indeed, in the case of gifts made *inter vivos* exigible during marriage, they will not usually increase the donor's patrimony. Because they were

agreed to at the time the marriage contract was drawn up, the donor cannot foresee the extent of his future wealth and, furthermore, he will not wish to reduce his credit by binding himself to make an excessively large gift. Very often, the result is that the contract contains a gift that seemed quite appropriate at the time the contract was drawn up but can be absurdly low a few years later as compared with the donor's fortune. Furthermore, should the marriage end without the gift having been executed, while being exigible, court intervention may declare it forfeited.

With respect to gifts made in contemplation of death and save the case of the conventional appointment of an heir which we have just examined⁶³⁹, our analysis of gifts *inter vivos* also applies.

Conclusion of title

332. The conventional separation of property enjoys a reputation of simplicity that is justified by its concise regulation, but that is inconsistent with real family life. Indeed, although this regime is based on the independence of patrimonies, it is impossible to set up a normal home without the property of both consorts being put in common to some degree. The Code finally acknowledged this fact by providing for the existence of undivided property.

We are of the opinion that the attractiveness of the separation of property relates to its coordination techniques which allow each consort to act without requiring the consent of his spouse. A study of marriage contracts of separation of property would permit us to confirm our proposals, for in these contracts, the consorts are attempting, by way of gifts, to palliate the strictness of the independence of patrimonies.

However, people married under any of the regimes based on the partition of property could feel the need to bring their matrimonial regime to an end, while continuing to live with their spouse. In such a case, they may avail themselves of the conventional mutability, but should the consorts not agree on the change of regime, they must then resort to the judicial separation of property.

TITLE II

THE JUDICIAL SEPARATION OF PROPERTY

333. The judicial separation of property may only be sought when the spouses' matrimonial regime is the partnership of acquests or one of the

conventional communities. This is normal since the conventional regimes of separation do not, as a rule, acknowledge the effect of marriage upon property beyond the needs for survival; consequently, no partition takes place at the time of dissolution. Since the spouses are not entitled to the partition of their respective patrimonies or of the common patrimony under such regimes based on the independence of patrimonies, the legislature did not deem it advisable to grant the spouses the right to seek a judicial change of regime.

Considering the traditional perspective of the judicial separation of property, it is logical for the legislature to grant it only under regimes based on the partition of property and only when such partition can be realized by the regime's techniques.

However, if the "separation of property" is considered as a means of judicially changing the matrimonial regime when both spouses do not agree to do this by covenant, then, the name should have been changed to that of "a judicial change of matrimonial regime" and standards special to each regime should have been prescribed.

As a matter of fact, the purpose of the judicial separation of property is to protect the spouses, or the wife, when the regime under which they married is contrary to the interests of the household, and in this frame of mind, it could also be applied to the conventional separation of property, subject to making the necessary changes.

However, the Quebec legislature adapted the judicial separation of property to the partnership of acquests at the time of the 1969 reform, but it did not take the further step which would have permitted all married people to take advantage of this protective measure under all regimes.

We simply wish to advance this idea which seems valid in our opinion, but there may be considerable technical difficulties in its application.

We must now examine the judicial separation of property regulated in the *Civil Code* and, in order to do this, we will examine the causes which may give rise to a request for separation of property in the first chapter, and in the second chapter, we will study the protection of the interests of the parties during the proceedings for separation of property; finally, we will analyze the effects of such a separation of property in the third chapter.

Chapter I

The Causes of Separation of Property

334. We wish to state again that the action for separation of property may be instituted by either spouse under the partnership of acquests⁶⁴⁰, whereas under the community of property only the wife may seek a judicial separation of property⁶⁴¹. Judicial separation has been traditionally considered as a means of protecting the rights of a spouse at the time of partition and, for that reason, the right to obtain the separation of property is given to the one who does not have the administration of the property that will be divided at the time of the dissolution. Therefore, historically, only the wife had this right under the community of property. For the same reason, the legislature granted the right to request the judicial separation of property to both spouses under the partnership of acquests.

Due to the fact that the judicial separation of property is only a means of bringing about the dissolution of the regime and, consequently, partition, without putting an end to the marriage, it is normal that the right to request it be given to the one or to those who have no control over the property to be divided.

Still, it is somewhat surprising for the legislature to have only given this right to the wife common as to property, without having granted it to the husband at least in some cases. Indeed, under the community of property, the wife now has, with respect to the reserved property, a capacity identical to that of the husband with respect to the common property. Yet, the legislature has maintained the paradoxical situation of leaving to the wife both the administration of her reserved property and the right to keep it, without the husband being able to force her to return them to the community neither by a judicial separation nor at the time of partition.

However, the legislature has prescribed for each regime the causes which may give rise to an action for separation of property.

Section 1

The causes of separation of property under the partnership of acquests

335. After having indicated that either of the spouses may obtain the judicial separation of property, article 1440 prescribes the only cause as follows: “when it is revealed that the application of the rules of the regime is contrary to the interests of the household”⁶⁴². We have already analysed this expression, pointing out that it should not give rise to a restrictive interpretation⁶⁴³.

Our courts may be inclined to interpret this article in light of the following article, relating to the community of property, and in light of the jurisprudence in this area. In some respects, such an interpretation could be welcomed, especially when one of the spouses administers his property in such a manner as to effectively destroy the other’s right in the partition. However, we think that article 1440 should give rise to a more autonomous interpretation based on the general regulation of the partnership of acquests on the one hand, and on the other hand, on a positive interpretation of the criterion applied in seeking a judicial separation of property.

It is ultimately up to our courts to find causes, under the partnership of acquests, which will correspond to the legislature’s language.

Section 2

The causes of separation of property under the community of property

336. The legislature is somewhat more specific in establishing the causes allowing the wife⁶⁴⁴ to obtain a judicial separation of property.

Indeed, article 1441 stipulates that the wife can demand the separation of property: “1) when her interests are imperilled”; and “2) when the husband has abandoned her or she is forced to provide alone or with her children for the needs of the family”⁶⁴⁵.

The second of these causes is purely factual. The question is therefore a simple matter of proof, establishing that the husband has abandoned his wife or the home, or on the other hand, that he is living at his wife’s expense or even at his wife’s and children’s expense, remaining at home without assuming his responsibility, as head of the community, to contribute to the expenses of marriage out of the common property⁶⁴⁶.

On the other hand, the first cause, namely when the wife’s interests are jeopardized, is as general a cause as that giving rise to judicial separation

under the partnership of acquests. The courts must exercise their power of appreciation and decide whether the husband's actions effectively imperil the wife's interests in the common property which will only be realized at the time of partition. The right to obtain the separation of property is therefore given to her in order to bring about partition.

Our courts have applied the expression "imperil the wife's interests" to real life. They have thus held that when the husband did not assume his responsibilities as administrator of the community, leaving the administration up to his son who appropriated the revenues to himself, the wife's interests were "in grave and imminent peril" and thus held that there were sufficient grounds to warrant the action for separation of property⁶⁴⁷. In another case, the Court of Appeal held that the general gift of the property of the community by the husband imperilled the matrimonial rights and advantages of the wife and thus were grounds for an action for separation of property⁶⁴⁸.

In other respects, our courts have considered disagreements between the spouses. If a disagreement imperils the wife's interests, it constitutes grounds for the separation of property⁶⁴⁹. On the other hand, a simple misunderstanding has not been considered as a cause giving rise to the separation of property, for, in the case, the court considered that the separation would have been contrary to the wife's interests⁶⁵⁰.

Thus, with respect to the imperilment of the wife's interests, it must be established that the husband's actions are of such a nature that they may be economically detrimental to his wife.

Since the judicial separation of property constitutes a protective measure for the one who institutes the action, it is normal for the legislature to have provided for protective measures during the proceedings.

Chapter II

Protection of the Interests of the Parties at the Time of the Separation of Property

337. The action for separation of property is usually instituted in order to protect the interests of one or the other of the spouses, but since the interests of third parties must also be protected in accordance with the general regulation of the matrimonial regimes, the legislature provided for protective measures for the consorts as well as third parties. It is normal for these measures to exist during the proceedings in separation of property, since the property at issue is beyond the control of the consort who seeks the separation. If such measures did not exist, his spouse could, during the proceedings, dispose of property in which he has a right. Furthermore, measures must be provided for even after the ruling.

Section 1

Protection of the consorts

338. During the proceedings, both spouses can take protective measures in order to avoid the disappearance of property in which they have a right at the time of partition.

Thus, article 1443 of the *Civil Code* provides: "Either of the consorts may, during the proceedings in separation of property, register against any immovable forming part of the acquets or of the community a notice that suit has been brought". The new article 815⁶⁵¹ of the *Code of Civil Procedure* specifies: "Each consort may also advise the Registrar of the Registration Division, in which the immovables forming part of the community or acquets are situated, of the action by having served upon him a notice

containing a description of the immoveables. The Registrar must forthwith note the action in the index to immoveables”.

With respect to the immoveables subject to partition, both consorts may request that the action for separation of property be noted in the index to immoveables. The legislature gives this right to both spouses for both can have respective interests in the other’s immoveables.

Furthermore, the *Code of Civil Procedure* also provides for protective measures with respect to moveables. “Each consort may seize before judgment the moveable property belonging to him which is in the hands of his spouse; he may do likewise with regard to the property of his spouse in which he would be entitled to a share in the case of dissolution of the matrimonial regime”⁶⁵². Thus, with respect to moveables, two possibilities are considered: on the one hand, the property that is in the hands of a spouse, but that belongs to the other; on the other hand, the property that is subject to partition. In this case, one may consider a mutual seizure of the moveable acquets, for each spouse has a right to the partition of the other spouse’s acquets. However, mutual seizure is also possible under the community of property. Indeed, the wife may have the common moveables seized, and the husband may have the reserved moveables seized, if they exist. Of course, the husband cannot force his wife to bring her reserved property, but he nevertheless has a right to the partition of that property up to the time when the wife renounces the community and, consequently, before the wife’s renunciation, he is entitled to a share of such reserved property in case of dissolution. We must point out that the same argument can apply to immoveables, for both spouses can have mutual interests in their consort’s immovable acquets, or in the common or reserved immoveables.

These provisional measures therefore protect each spouse from the other spouse’s actions during the proceedings.

Section 2

Protection of third parties

339. The legislature has also provided protective measures for third parties, because the spouses, or one of them, could seek the judicial separation of property with the intent of defrauding the creditors⁶⁵³. These protective measures are found in the *Civil Code*.

First of all, the Code prescribes that “the creditors of the consorts cannot ask for separation, even with the consent of the consort who is their debtor”⁶⁵⁴. That provision reproduces old article 1315, with a somewhat different wording. Because of the personal nature of the action for separation of property, the creditors may not avail themselves of such a recourse granted to both consorts or to the wife. However, it is deemed that the heirs

of a spouse could have an interest in continuing the suit brought by their ancestor, because of the retroactive effect of the separation of property even if the regime is dissolved by death⁶⁵⁵.

The heirs would then benefit from the retroactive effect of the dissolution if the action for separation is acceded to and would meanwhile also benefit from the provisional measures of protection.

However, in the case of insolvency of a spouse, the creditors of his spouse may exercise the rights of their debtor to the extent of their claims⁶⁵⁶. As in the case of bankruptcy or insolvency, the matrimonial regime is deemed to be dissolved with respect to creditors⁶⁵⁷; they are allowed to proceed in the same manner as in the other cases of dissolution⁶⁵⁸. Therefore, in the case of insolvency of their debtor's spouse, the creditors of a spouse may demand the rights to which their debtor would be entitled in case of dissolution, although they may not claim beyond the amount of their claim. Thus, the creditors bring about an early partition.

340. However, when the separation of property is obtained by one of the spouses, the creditors of one or the other may intervene in the suit to contest it⁶⁵⁹. Indeed, if the request is made with the intent of defrauding the creditors, their intervention is justified. It is justified in all cases where their rights are affected by the separation of property. This provision is similar to that enacted with respect to the conventional change of matrimonial regime⁶⁶⁰, although the creditors will only be informed by way of a notice in the newspapers⁶⁶¹ in the case of separation of property.

Nevertheless, the creditors of a spouse may always adopt proceedings against a separation of property which has been pronounced or even executed in fraud of their right⁶⁶². Here again, this right is similar to that given to the creditors in the case of renunciation of partition⁶⁶³.

Thus, the creditors may always intervene in the suit in separation of property, even in the event that they do not take knowledge of the notice published in newspapers. It would be advisable for the notice of motion to be served on them, as it is required at the time of the homologation of a conventional change of regime. Yet, they may always avail themselves of the recourse given to them by the Code in order to adopt proceedings against the separation pronounced or even executed.

341. Protection of the interested parties at the time of the separation of property is therefore offered during the proceedings on the one hand, and, on the other hand, after the decision. In the first case, the spouses as well as the creditors may avail themselves of protective measures, although these measures are not identical in both cases. On the other hand, after the decision, and to the exclusion of possible appeals, only the creditors may adopt proceedings against the judgment when the separation has been obtained in fraud of their rights.

However, once the judgment has been delivered, and irrespective of such possible intervention by the creditors, special attention must be given to the effects of the judicial separation of property.

Chapter III

Effects of the Judicial Separation of Property

342. The judgment of separation of property must meet certain conditions to take effect. When such conditions are met, the judgment is retroactive to the date of the action and brings about the partition of property. The spouses are then subject to a new matrimonial regime.

Section 1

Conditions required for the judgment of separation of property to take effect

343. There are two types of conditions; on the one hand, there is the formality of registration that is required with respect to third parties, and on the other hand, the Code requires the execution of the separation of property.

Paragraph I

Registration of the judgment

344. Old article 1313 of the *Civil Code* required the protonotary to register the judgment at the office of the court, and also stipulated that the separation has effect with respect to third parties only from the day when such formal requirements were met⁶⁶⁴. That same provision could be found in

section 1097 of the old *Code of Civil Procedure* and was also amended in 1931⁶⁶⁵. That section did not explicitly prescribe that a judicial separation has no effect with respect to third parties before registration. However, the Report of the Commission on Women's Rights, which proposed the repeal of article 1313 of the *Civil Code* and the amendment to section 1097 of the *Code of Civil Procedure*, explicitly mentions registration⁶⁶⁶.

Furthermore, the new *Code of Civil Procedure* reproduced section 1097 of the old Code in its section 817⁶⁶⁷. That section was again amended at the time of the reform of matrimonial regimes⁶⁶⁸. Thus, the new section 817 of the Code of Procedure prescribes: "The protonotary, or as the case may be, the clerk of the court who renders a judgment maintaining an action for separation of property (. . .) must forthwith give notice of such judgment to the person entrusted with keeping the central register of matrimonial regimes".

That section does not explicitly mention that the judgment of separation of property takes effect with respect to third parties only by the registration of the notice in the central register of matrimonial regimes. We think that an explicit mention was not necessary considering that the provisions for notice and registration are intended for the information of third parties so that judicial acts may have effect with respect to them. Furthermore, we think that the analogy between section 817 of the Code of Procedure and articles 1266a and 1266b of the *Civil Code* is almost perfect; the last article stipulates explicitly that the conventional change of regime has effect with respect to third parties only by the registration in the central register of matrimonial regimes. Thus, registration is required for the judgment in separation of property to take effect with respect to third parties. However, it is the protonotary or the clerk, as the case may be, who must give notice to the person entrusted with keeping the central register of matrimonial regimes.

However, registration is not sufficient, the *Civil Code* also requires that the judgment be executed.

Paragraph II

Execution of the judgment

345. Indeed, the second paragraph of article 1442 stipulates that separation of property judicially obtained "has no effect so long as it has not been carried into execution in the manner provided for in the *Code of Civil Procedure*". Moreover, section 819 of the Code prescribes: "The judgment of separation of property is executed by the actual payment, established by an authentic deed, of what the wife has a right to receive or get back, or the institution by her of proceedings for the purpose of obtaining such payment, but without prejudice to the rights of third parties".

Therefore, execution can be carried out either by the agreement of the consorts to divide their property, inasmuch as this partition is established by an authentic deed, or by the institution of proceedings leading to partition. Let us point out that this section 819 of the *Code of Civil Procedure* should have been amended since the separation of property can now be requested by both consorts under the partnership of acquests.

Furthermore, section 816 of the *Code of Civil Procedure* provides: “The court, in maintaining the action, may at the same time determine the reprises of the wife, or order that they be determined by a practitioner or expert, as the case may be”. Such determination⁶⁶⁹ cannot be considered as an execution of the judgment, it facilitates the carrying of the judgment into execution.

The Code requires the execution of the judgment in order to avoid frivolous motions. Indeed, a spouse married under the partnership of acquests, who has obtained a separation of property because the rules of the regime proved to be contrary to the interests of the household, or a wife common as to property who obtained it because her interests were imperilled, would show that the circumstances have changed if they did not carry the judgment into execution, if they did not effectively proceed with the liquidation and partition of the regime.

The provisions of the *Civil Code* under article 1444 apply only to the communities of property. The Code provides therein that if “the amount at which the rights of the wife have been determined is not voluntarily paid, execution may be enforced as in ordinary cases. Nevertheless, the husband may compel the wife to receive immoveables in payment, at a valuation established by experts, provided such immoveables are suitable and do not prejudice her interests”. According to its wording this article applies only to the regimes of community. We understand that the last provision, with respect to the payment out of immoveables, cannot apply to the partnership of acquests since, under that regime, according to article 1267b, the spouse who holds the patrimony determines the method of compensation and since article 1267c stipulates that the partition may be effected in value, still at the discretion of the consort who holds the patrimony.

However, we do not think that enforced execution can be left out of the partnership of acquests if payment is not made voluntarily. As a matter of fact, section 819 of the Code of Procedure, which applies to both regimes in spite of its wording, provides for this possibility.

Finally, we point out that the Code does not require the execution of the judgment when the separation of property results from a judgment of separation from bed and board⁶⁷⁰.

346. Thus, the separation of property can only take effect when it has been registered; when the spouse who has obtained this judicial separation has carried the judgment into execution; and when partition of the property is effected. Judicial separation being a protective measure, it is normal for the legislature to have provided for its retroactive effect to the date of the action.

Section 2

Retroactive effect of the judgment of separation of property

347. The judicial separation of property exists in our law in order to permit one of the spouses, under the partnership of acquests, or the wife, under the community, to force his or her spouse into proceeding with the partition of the property when the rules of the regime prove to be contrary to the interests of the consort who makes the request.

Since judicial separation is aimed at the protection of the spouse who requests it and since the other spouse could, during the proceedings, destroy or dispose of property to be divided, the Code stipulates in article 1442 that “separation of property judicially obtained has a retroactive effect to the day of the institution of the action”.

This retroactive effect of the judicial separation could be considered as unnecessary considering the protective measures available to the spouses under our law. However, the retroactive effect is an additional measure ensuring the protection of the spouse.

Thus, when the separation of property is judicially pronounced, and provided it has been registered and carried into execution, the regime is retroactively dissolved as of the day of the institution of the action. Consequently, any change, increase or reduction in the acquests of each spouse in the common patrimony, which occurred between the day of the institution of the action and the time of partition, must be disregarded. Liquidation and partition must take place taking into account the composition of the property to be divided as it existed on the day of the institution of the action. The spouse who obtained the separation of property is thus protected; he does not have to bear the consequences of unfortunate or dishonest actions on the part of his spouse nor the slowness of the proceedings.

However, the plaintiff may only benefit from this retroactive effect provided the action for separation of property has not been quashed on account of the running of the statute of limitations. Furthermore, our Court of Appeal once held that an adjournment of proceedings for over two years constitutes a tacit renunciation of retroactivity⁶⁷¹. Justice Rinfret wrote: “Such a prolonged interruption, in my opinion, shows that the plaintiff did not have serious reasons to fear for her property in 1955 and that only in August 1957 did such reasons become serious, thus we have a case of revival. It would be *unfair* to the interested parties, the future creditors or to those who would deal with the husband to maintain such a Sword of Damocles hanging over them for so long”⁶⁷².

Applying old article 1314 of the Code which has the same effect as the first paragraph of present article 1442, the judge took into consideration a notion similar to that found with respect to the execution of the judgment. Indeed, in that case, because the wife suspended the proceedings, the judge concluded that the action was unfounded and that the revival must be con-

sidered as a new action with respect to retroactivity⁶⁷³. However, we wonder whether the judgment would have been the same without the background of bankruptcy by the husband preceded by numerous fraudulent actions. Indeed, we find it hard to understand how a clear and explicit provision such as the first paragraph of article 1442, is not applied and how the plaintiff spouse can thus be deprived of the benefit of retroactivity. Justice Rinfret's argument is understandable, however, in the context of judicial separation for when the wife common as to property considers that her interests are imperilled, it does not seem normal for her to suspend the proceedings, considering also that the judicial separation in that case was a clear example of acts done by the consorts to defraud the husband's creditors.

Therefore, once the judgment has been carried into execution, the spouses become separate as to property as of the date of the institution of the action.

Section 3

The consorts' new situation

348. The spouses will irremediably be subject to the regime of separation of property. Indeed, article 1448 of the *Civil Code* stipulates that: "Consorts judicially separated as to property are in the same situation as consorts conventionally separate as to property". Article 1447 specifies that "consorts judicially separated as to property must contribute, each in proportion to his means, to the expenses of the household as well as to those of the education of their common children". This last specific provision was perhaps not necessary since that of article 1448 indicates that the spouses thus separate as to property are in the same situation as those who have conventionally chosen the separation of property and since the regulation of this regime imposes on the spouses, in article 1438, the obligation to contribute to the expenses of marriage in proportion to their respective resources in the absence of covenants to that effect. We point out, however, that, as opposed to old article 1317, the present regulation does not explicitly mention the insolvency of one of the spouses. Old article 1317 mentioned only the husband's insolvency, thus imposing the obligation to bear such expenses on the wife. According to the present regulation which prescribes a contribution in proportion to the resources of each spouse, it seems evident that, if one spouse is insolvent, the other shall assume the obligation.

However, notwithstanding the provision of article 1448, spouses judicially separated as to property are not exactly in the same situation as spouses conventionally separate as to property since they are able to mitigate

the strictness of the independence of patrimonies by way of gifts. Because spouses are now permitted to make gifts *inter vivos*, they may mitigate the separation of property by way of gifts which will not necessarily be included in the marriage contract since there is no contract.

Furthermore, article 1449 specifies that “the dissolution of the partnership of acquests or of the community effected by separation, either from bed and board or as to property only, does not give rise to the rights of survivorship, unless the contrary has been expressly stipulated in the contract of marriage”. It is normal that the separation does not give rise to the rights of survivorship since its only purpose is to bring about the dissolution of the matrimonial regime.

Conclusion of chapter

349. The dissolution of the matrimonial regime can be brought about by either spouse under the partnership of acquests, or the wife under the community. This is a measure provided for the protection of the plaintiff's interests and it is normal for the legislature to regulate it without forgetting the interests of third parties. Consequently, with respect to effects, registration informs and protects the latter, whereas the execution of the judgment shows the seriousness of the motion, while at the same time avoiding uncertainty with respect to the consort's regime. Finally, in order to further protect the plaintiff, dissolution shall take effect on the day the spouse instituted the action, the main and final effect being that the spouses, while continuing the marriage, change matrimonial regimes, even if one of them is opposed thereto, and thus become subject to the separation of property.

Conclusion of title

350. Separation of property judicially obtained is an exceptional means permitting one of the spouses, under the partnership of acquests, or the wife, under the community, to force the dissolution of the regime in spite of the spouse's opposition. It may only be requested in certain cases and it always results in the regime of separation of property. However, because of the

present principle of mutability of matrimonial regimes, spouses judicially separated as to property could adopt a regime other than the separation of property by way of the conventional change of regime.

In our opinion, the judicial separation of property is a modality of mutability, and, in this perspective, we think that the legislature should have found a way to provide for it under all the regimes. Of course, if this “judicial change of regime” were to be applied to all regimes, it would require an adequate regulation. The most serious problem raised in this respect would relate to the regime to which the judicial change would have given rise. Indeed, judicial separation traditionally results in the regime of separation of property, but should the judicial change of regime be considered, it would be necessary to provide that such a change could give rise to other regimes. We only wish to raise the question, aware of the difficulty it raises with respect to solutions.

Conclusion of Part Three

351. Having completed our study of regimes based on the independence of patrimonies using coordination techniques in Quebec, we feel it necessary to make the following comments.

With respect to their basic concept of independence of patrimonies, we believe that these regimes (we use the plural because of their conventional character, although the separation of property is still in question), in most cases, are not suitable as a secondary legal regime. We think that they may be suitable in some cases and, for that reason, they appear to be proper conventional regimes. Indeed, there are situations in which the regimes based on the partition of property may not be suitable, for example, in the case of the remarriage of people having children of the first marriage.

However, the independence of patrimonies remains in clear opposition to the concept of marriage as the Quebec legislature became fully aware in enacting article 1439 of the *Civil Code*.

Furthermore, we still believe that marriage contracts of separation of property seem to apply techniques of coordination between spouses more than the independence of patrimonies. This is evidenced by the many dispositions by gratuitous title included in such contracts aimed at permitting either mutual participation in the growth of the patrimony, or, at least, giving a certain amount of money, usually to the wife.

Moreover, the popularity of the separation of property seems to be a result of notarial practices rather than a recognition of the qualities or suitability of the regime in the Quebec sociological context.

General conclusions

352. We prefer to speak of general conclusions rather than recommendations although we are aware that our study does not lend itself to conclusions because of its nature. However, because of the type of recommendations we intend to formulate, the expression "general conclusions" seems more suitable to us.

While descriptive, our study contains a good number of criticisms and suggestions which are technical for the most part and relate to concrete aspects of the regulation of matrimonial regimes. We do not deem it opportune to list these suggestions here, for outside their context, they would require lengthy explanations to be well understood. On the other hand, we have put forward ideas which relate to legislative policy. We think that such conclusions or recommendations could be more useful to the Commission.

353. The first step to be taken by the legislature in the field of matrimonial regimes must relate to the effect of marriage upon property. We think that the regimes which usually correspond best to the reality of marriage and the family are those that acknowledge the effect of marriage upon property, demonstrated by the partition of property at the time of the dissolution of the regime.

354. In second place, we believe that the matrimonial regime must apply coordination techniques in order to promote balance between the consorts.

355. Thirdly, having accepted these premises (nos. 353 and 354), the legislature should adopt a primary regime that would regulate the minimal effect of the family upon the spouses' property in a mandatory manner. This primary regime, which forms the basis of matrimonial regimes, could be a sort of basic legislation for the patrimonial organization of the family. We think that the Commission could be the national catalyst for the adaptation of the principles of the primary regime to the peculiarities of Common Law and Civil Law, while finding the adequate institutions to put such a regime into force. Should this primary regime be adopted in the different provinces, a good number of problems in private international law could thus be avoided.

356. Fourthly, the principle of freedom of marriage covenants should be maintained so as to permit each couple to adopt the secondary regime most suitable to them, while respecting the primary regime. Yet, there should be a legal secondary regime. It would apply in all cases where the spouses have not entered into a marriage contract. We suggest, as a legal regime, a regime similar to the partnership of acquests, while improving the techniques of that regime. The criticisms we have made could be used as a guide for the improvement of that regime.

357. In fifth place, the principle of controlled mutability of matrimonial regimes should be maintained in order to permit spouses to adapt their regime to the changing reality of their family life.

358. We think that these five recommendations summarize the substance of the legislative policy we recommend. As to their technical application, we are hopeful that the suggestions contained in our study will be useful to the Commission.

Finally, we wish to point out that the patrimonial organization of the family, and especially the regulation of matrimonial regimes, must be established with respect to the normal circumstances of marriages, and not with respect to pathological circumstances. Even though pathological situations must be regulated, generally, legislation cannot be made in principal consideration of such cases.

References

1. For a study of these questions, cf. J. RENAULD, *Droit patrimonial de la famille*, Vol. I: *Régimes matrimoniaux*. Brussels, Larcier, 1971, nos. 52 to 76, pp. 57-73, and references, and nos. 256 to 331, pp. 179-229 and references.
2. Cf. E. CAPARROS, *Les lignes de force de l'évolution des régimes matrimoniaux en droits comparé et québécois* (thesis) Quebec, type-written, 1972, No. 3, pp. 4-6 and references.
3. "From the time the couple live together in the same dwelling, eat at the same table and sleep in the same bed, there is necessarily a pool of common expenses for which certain funds must be provided. These common expenses are much more extensive; whatever the couple's wish for independence, these expenses encompass so many more things than the bodies married to each other". A. SAVATIER, *Le droit, l'amour et la liberté*, 2nd. ed., Paris, L.G.D.J., 1963, pp. 104-105.
4. It has even been said that the minimum requirement of matrimonial regimes would be the regulation of the contribution to the expenses of marriage, cf. H. DE PAGE. *Traité élémentaire de droit civil belge*, Vol. 10-11, Brussels, Bruylant, 1949, No. 2. p. 11. See also J. CARBONNIER. *Droit civil*, Vol. 1, 3rd. ed., Paris, P.U.F., 1960, No. 115, pp. 369-373. But see *contra*, J. RENAULD, *op. cit. supra*, n. 1, No. 77, pp. 73-74.
5. The expenses of marriage are determined under Quebec law in proportion to the husband's resources. Cf. *Lefebvre v. Labonté*, (1947) C.S. 256; *Hôpital Ste-Jeanne d'Arc v. Prud'homme*, (1949) C.S. 487; *Gratton v. Dorfman*, (1960) C.S. 457; *Pépin v. de la Chevrotière*, (1959) C.S. 603; *M. Shuchat Fur Co. Ltd. v. Pariseault*, (1972) C.A. 138. See also G. BRIERE, "Les charges du mariage", (1967) 2 R.J.T. 451-481.

6. There is always, at least, the food allowance obligation (Cf. arts. 165 and 166, *C.C.*) and even in regimes where this effect is rejected, the obligation to contribute to household expenses (Cf. art. 1438, *C.C.*)
7. For example, the new partnership of acquests in Quebec.
8. For example, cf. art. 176, *C.C.*
9. Cf. art. 1437, *C.C.*, but see also art. 1439, *C.C.*, which provides for the partition of certain property.
10. Art. 1439, *C.C.* may be considered as an example of incongruity between the regime and reality.
11. Mainly with respect to moveables and transferable securities. Furthermore, joint bank accounts are widely used.
12. Cf. art. 1280, para. 5, *C.C.* and art. 1266q, *C.C.*
13. Cf. art. 1267c, *C.C.* and 1361, *C.C.*
14. Cf. arts. 1266r to 1267d, *C.C.* and 1310 to 1378, *C.C.*
15. Cf. art. 1266o, *C.C.* for gifts of acquests and 1272 and 1425a, *C.C.* for common and reserved property.
16. Usually, in regimes of community of property.
17. For example, cf. J. TURGEON, "L'évolution de la condition des époux: Québec", *tx. de l'Ass. H. Capitant*, Vol. VII, Montreal, Doucet Ltée, 1956, p. 145.
18. Cf. K. D'OLIVECRONA, "Précis historique de l'origine et du développement de la communauté de biens entre époux," (1965) 11 *Rev. hist. dr. fran. et ét.*, pp. 169-189, 248-299 and 354-424.
19. Cf. *Rapport des Codificateurs*, 2nd. ed., Second Report, Vol. 1, Quebec, Desbarats, 1865; P. B. MIGNAULT, *Le droit civil canadien*, Vol. 1, Montreal, Théoret, 1895, pp. 503-507; F. LANGELIER, *Cours de droit civil de la province de Québec*, Vol. 1, Montreal, Wilson and Lafleur, 1905, p. 310-327; COMMISSION ON CIVIL RIGHTS OF WOMEN, *First Report*, Quebec, S. ed., 1930, pp. 8-12, and *Second Report*, Quebec, S. ed., 1930, pp. 35-37; *Traité de droit civil du Québec*, Vol. 1, by G. TRUDEL, Montreal, Wilson and Lafleur, 1942, p. 502; L. MARCEAU, *De l'admissibilité des contrats entre époux*, Montreal, Wilson and Lafleur, 1960, Nos. 42-46, pp. 72-77; R. COMTOIS, *Traité théorique et pratique de la communauté de biens*, Montreal, Le Recueil de droit et de jurisprudence, 1964, Nos. 308a-309, pp. 276-278. See also H. DE PAGE, *op. cit. supra*, note 4, Vol. 1, 2nd. ed., Brussels, Bruylant, 1948, Nos. 710-711, pp. 778-781, No. 714 bis, pp. 786-789 and Nos. 726-726 bis, pp. 800-802; M. ANCEL, *Traité de la capacité civile de la femme mariée d'après la loi du 18 février 1938*, Paris, Sirey, 1938, No. 90, pp. 170-171; E. ROGUIN, *Traité de droit civil comparé*, Vol. 2, *Le régime matrimonial*, Paris, L.G.D.J. 1905, No. 254, p. 254.
20. Cf. P. B. MIGNAULT, *op. cit., supra*, note 19, p. 507; J. TURGEON, *loc. cit. supra*, note 17, p. 139; C. CANNON, "Certains articles du Code civil et l'incapacité de la femme mariée," (1948) 8 *R. du B.* 384-389; J. J. BEAUCHAMP, "Obligation de la femme mariée avec

ou pour son mari," (1896) 2 *R.L.n.s.*, pp. 326-327 and 387-388; see also R. SAVATIER, *op. cit. supra*, note 3, p. 82 and H. DE PAGE, *op. cit. supra*, note 4, Vol. 1, Nos. 709-714 *bis*, pp. 777-789.

21. Cf. art. 174, *C.C.* before the reform introduced by the *Act respecting the legal capacity of married women*, S.Q. 1964, c. 66, art. 1.
22. Cf. art. 986, *C.C.* before the reform introduced by the *Act to amend the Civil Code*, S.Q. 1954-55, c. 48, art. 2.
23. For example: the regulation of the community of property before the reforms of 1931, cf. arts. 1292-1309, *C.C.*
24. A married woman could bequeath property (Cf. arts. 184 and 832, *C.C.*, wording of 1866) and be a mandatary (Cf. art. 1708, *C.C.* wording of 1866) but in such case she could be sued only with the authorization of her husband (cf. arts. 176 and 183, *C.C.*, wording of 1866).
25. For the separation of property, cf. arts. 176, 177, 210, 1318 and 1422, *C.C.*, even before the reform introduced by the *Act to amend the Civil Code and the Code of Civil Procedure respecting the civil rights of women* S.Q. 1930-31, c. 101. The incapacity of women under this regime was only the consequence of the general principle of incapacity. This was proven in 1964, the woman separate as to property became fully capable when the principle of incapacity was repealed.
26. For the community of property, cf. art. 1292, *C.C.*, before the reform of 1931. Despite later reforms, and even after the one introduced by the *Act respecting matrimonial regimes* Q.L. 1969, c. 77, the wife common as to property remains subordinate to her husband in certain respects, see art. 1292, *C.C.*
27. Cf. *Act respecting the legal capacity of married women*, S.Q. 1964 c. 66.
28. Cf. art. 177, *C.C.* according to the 1964 wording. Under the community of property, the capacity of women is limited to the techniques of the regime which have not been changed; the common property and single administration are maintained, see art. 1292, *C.C.* according to the 1964 wording.
29. This principle was set forth in art. 986, *C.C.*, before the reform of 1954-55.
30. The marital authority, art. 174, *C.C.* of 1866 and the authorization required to enter into certain acts, arts. 176-181, *C.C.* of 1866.
31. Cf. *supra*, note 27.
32. Cf. *supra*, note 28 and *Act respecting matrimonial regimes* 4th Sess., 28th Parl., Bill 10 (assented to), explanatory notes, Nos. 12-13, p. IX.
33. By using techniques such as those of the partnership of acquests.
34. Even at the time of codification, they rejected the idea of the weaker sex. Cf. MIGNAULT, *op. cit., supra*, note 19, pp. 507 and 534-535.
35. For example, cf. *Act of June 4, 1970*, D. 1970, L. 138 and C. COLOMBET, "Commentaire de la loi du 4 juin 1970 sur l'autorité parentale," D. 1971, chron. 1-32.

36. For example, cf. J. CARBONNIER, *op. cit. supra*, note 4, Nos. 116 and 117, pp. 374-383, although this author uses the expression "non-community" instead of separation; J. RENAUD, *op. cit. supra*, note 1, No. 257, pp. 179-180.
37. Cf., taking nuances into account, J. RENAUD, *op. cit. supra*, note 1, No. 260, 182-183, No. 302, pp. 212-213, and Nos. 307-331, pp. 216-229; and see C. CHARRON, "La séparation de biens comme régime légal? Un essai de bilan", (1971-72) 74 *R. du N.* 312-313 and J. PINEAU, *Les régimes matrimoniaux*, Montreal, Cours de Thémis, 1972, 8-11 and 15-16.
38. Cf. J. RENAUD, *op. cit. supra*, note 1, No. 316, pp. 221-222 for the German *Zugewinnngemeinschaft* and G. BRIERE and P. BELIVEAU, "Réflexions à l'occasion d'une réforme", (1970-71) 73 *R. du N.* 67-69 for the partnership of acquests.
39. Cf. C. CHARRON, *loc cit. supra*, note 37, p. 321; E. CAPARROS, "L'état actuel de la réforme des régimes matrimoniaux en droit québécois," in *Estudios de derecho civil en honor del prof. Castán Tobeñas*, Vol. IV, Pamplona, E.U.N.S.A., 1969, pp. 195-197.
40. Cf. *supra*, Nos. 2-5.
41. Cf. *supra*, Nos. 6-8.
42. Cf. arts. 1436-1439, *C.C.*
43. Former regime of *B.G.B.*
44. Cf. arts. 1416-1421, *C.C.* before the reform of 1964.
45. Unknown in Quebec. The conventional regime notably in France, Belgium, Spain. For example, cf. H. DE PAGE, *op. cit. supra*, note 4, Vol. X, Nos. 1425-1448, pp. 1174-1188.
46. Cf. art. 1437, *C.C.*
47. By definition, the only regime which requires subordination techniques, Cf. E. CAPARROS, *op. cit. supra*, note 2, n. 31, p. 51.
48. The subordination techniques are evident in this regime with respect to the dowry, the administration of which is entrusted to the husband.
49. The principal difference in these regimes relates to the property to be divided: all property under the general community; the moveables and acquests or only the acquests.
50. For a study of these regimes see I. ZAJTAY, and E. VAZ FERREIRA, "Contribución al estudio de los regimenes matrimoniales de participación", (1950) I, *Revista de la Facultad de Derecho y Ciencias Sociales* (Montevideo), pp. 813-865.
51. Cf. M. LIENARD-LIGNY, "L'émancipation de la femme mariée hollandaise dans le cadre du régime légal de communauté universelle", (1958) *Annales de la Faculté de Droit de Liège*. pp. 119-160.
52. Cf. arts. 1412 and 1413, *C.C.*
53. Mainly because the common property and single administration have been preserved, Cf. *supra*, note 32.
54. Cf. arts. 1266d to 1267d, *C.C.* and *supra*, note 50.

55. For a study of this evolution and this tendency in comparative law, cf. E. CAPARROS, *op. cit. supra*, note 2, Nos. 136-186.
56. Cf. E. CAPARROS and R. MORISSET, "Réflexions sur le Rapport du Comité des régimes matrimoniaux", (1966-67) 8 *C. de D.* 152-214; E. CAPARROS, "Remarques sur le Bill 10, loi concernant les régimes matrimoniaux", (1969) 10 *C. de D.* 496-507; *ID.*, "Remarques sur l'avant-projet de protection de la résidence familiale", (1971) 12 *C. de D.* 316-320.
57. Cf. E. FERNANDEZ CABALEIRO, "Los regimenes economico-matrimoniales y la comunidad europea", in *Estudios de derecho civil en honor del prof. Castán Tobeñas*, (Cited: Est. Castán) Vol. IV, Pamplona, E.U.N.S.A., 1969, p. 337, note 15.
58. In chronological order, Sweden, cf. Ch. V, *G.B.*, Holland, cf. Title VI, Book I, *B.W.*, Germany, cf. Title V, Sect. 1, Book IV, *B.G.B.*, France, cf. Book I, Ch. VI, *Fr. C.C.*
59. Cf. Book I, ch. VI, *C.C.*
60. Cf. J. PINEAU, "L'élaboration d'une politique générale en matière matrimoniale", (1971-72) 74 *R. du N.* 3-27.
61. Cf. *supra* No. 9
62. Cf. F. PALA MEDIANO, "La pronoción de la mujer casada en la compilación aragonesa y en el derecho comparado", in *Est. Castán*, Vol. IV, Pamplona, E.U.N.S.A., 1969, 373.
63. Cf. art. 226, *Fr. C.C.*; and see R. LE BALLE, *L'utilisation des techniques dans la réforme des régimes matrimoniaux*, Paris, Les Cours de Droit, 1967-68, 13-15 and 37-49; J. PATARIN and G. MORIN, *La réforme des régimes matrimoniaux*, Vol. 1, Paris, Répertoire du Notariat Defrenois, 1966, No. 508, pp. 15-18; A. PONSARD, *La réforme des régimes matrimoniaux*, Paris, Dalloz, 1966, No. 35, p. 15; J. Y. SAYN, "Le régime matrimonial primaire", in *Les règles générales des régimes matrimoniaux*, Paris, Tx et Recherches de la Faculté de Droit et Sciences économiques, "Droit Privé" section, No. 4, 1968, 3-11.
64. Cf. "Dispositions générales relatives au statut juridique des époux", Ch. V, *G.B.*; "*Des droits et obligations des époux*", Title VI, Book I, *B.W.* and K. WIERSMA, "Le régime néerlandais de communauté universelle à gestion partagée" in *Les régimes matrimoniaux*, Brussels, Bruylant, 1966, No. 6, p. 253; "Effets du mariage en général", Title V, Section 1, Book IV, *B.G.B.* and O. SANDROCK, "Le régime matrimonial primaire", in *Les régimes matrimoniaux*, Brussels, Bruylant, 1966, No. 39, pp. 295-296.
65. For example, cf. art. 173 and ff, *C.C.*; art. 212 and ff, *Belgian C.C.*; art. 56 and ff, *Spanish C.C.*
66. Art. 216, *Fr. C.C.*
67. Cf. R. LE BALLE, *op. cit. supra*, note 63, 45-46.
68. Cf. for an outline of this question, E. CAPARROS, *op. cit. supra*, note 2, No. 27.
69. Cf. art. 176, *C.C.*

70. Cf. art. 180, *C.C.*
71. Cf. art. 177, *C.C.*
72. Cf. art. 173, *C.C.*
73. Cf. art. 175, para 1, *C.C.*
74. Cf. art. 180, *C.C.*
75. For a more detailed study, see E. CAPARROS, *op. cit. supra*, note 2, Nos. 147-184.
76. Cf. art. 2, Ch. V, *G.B.*; art. 161, para 2, *B.W.*; art. 214, para 1, *Fr. C.C.* and, in a different draft which, in our opinion contains the same idea, § 1360, *B.G.B.* And see C. RENARD, *Le régime matrimonial de droit commun*, Brussels, C.I.D.C. Bruylant, 1960, 66; K. WIERSMA, *loc. cit. supra*, note 64, No. 6, pp. 253-254; G. CORNU, "La réforme des régimes matrimoniaux", *J.C.P.* 1966, I, 1968, No. 9; A. PONSARD, *op. cit. supra*, note 63, No. 12, p. 7.
77. Cf. art. 2, Ch. V., *G.B.*; §§ 1356 and 1360, *B.G.B.*; art. 214, para 3, *Fr. C.C.* And see A. SNAEVERR, "Recent Developments in the Status of Married Women in Law and in Fact: Scandinavia", *Tx. du 9^e Colloque international de droit comparé*, Ottawa, Éditions de l'Université d'Ottawa, 1972, 247; J. G. RENAUD, "Rapport introductif", in *Les régimes matrimoniaux*, Brussels, Bruylant, 1966, No. 118, p. 93; F. MASSFELLER, "Matrimonial Property Law in Germany", in W. FRIEDMAN, (ed.), *Matrimonial Property Law*, Toronto, Carswell, 1955, 390 and 392-395; G. BEITZKER, "La loi allemande sur l'égalité de l'homme et de la femme", (1958), 10 *Rev. int. dr. comp.* 43; H. DOLLE, "L'égalité de l'homme et de la femme dans le droit de la famille", (1950), 2 *Rev. int. dr. comp.* 265; O. SANDROCK, *loc. cit. supra*, note 64, No. 43, pp. 297-298; P. RAYNAUD, "Principes directeurs de la réforme française (Loi du 13 juillet 1965)", in *Les régimes matrimoniaux, ut supra*, 234; A. PONSARD, *op. cit. supra*, note 63, No. 12, p. 8; J. PATARIN, and G. MORIN, *op. cit. supra*, note 63, No. 18, pp. 23-24.
78. For example, cf. (1956)), *Cmd.* 9678, No. 626, p. 170 and No. 644, p. 175; O. KAHN-FREUND, "Matrimonial Property—Some Recent Developments", (1959) 22 *Mod. L. Rev.* 248-252; D. LASOCK, "Family Law Reform Now?" (1965) 4 *Sol. Q.* 223; *ID.* "The Problem of Family Law Reform in England", (1966-67) 8 *Wm & Mary L. Rev.* 614; A. SAMUELS "Family Law Reform Now—A Comment on the Views of Dominik Lasok", (1965), 4 *Sol. Q.*, 359-360; L. SCARMAN, in *The Listener*, 10 Nov. 1966; Lord DIPLOCK, in *Pettitt v. Pettitt* (1969) 2 *W.L.R.* (U.K.) 966, on p. 10001 F-G; Lord DENNING, in *Nixon v. Nixon* (1969) 1 *W.L.R.* (U.K.) 1676, on p. 1679 G-H; See also *Matrimonial Proceedings and Property Act, 1970*, art. 37, and K. B. EDWARDS, "Matrimonial Proceedings and Property Act, 1970", (1970) 120 *New L.J.* 653 and R. L. WATERS, "Matrimonial Proceedings and Property Act, 1970", (1970) 114 *Sol. J.* 582-583. This movement can also be found in Ontario, see: ONTARIO LAW REFORM COMMISSION, *Study prepared by the Family Law Project: Property*

Subjects, pp. 544 (rev.)-555 (rev.): I. F. G. BAXTER, "A proposed new matrimonial regime for a common law jurisdiction", in *Est. Castán*, Vol. II, 37.

79. Cf. UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, *Condition juridique de la femme mariée*, Geneva, 1958, 64-66; E. GAUTHIER, "Le 4^e Congrès de la Fédération internationale des femmes des carrières juridiques (Paris 17-22 July 1961)", (1962) 14 *Rev. int. dr. comp.* 89.
80. Despite the absence of a primary regime, see the example of Belgium: art. 218, para 1, *Belgian C.C.* (according to the wording of the *April 30, 1958 Act* presently in force).
81. Cf. art. 1537, *Fr. C.C.* and art. 1537, *Belgian C.C.*
82. Cf. *supra*, notes 77 and 78.
83. Cf. art. 176, *C.C.*
84. Cf. also art. 180, *C.C.*, which we will analyse later.
85. Cf. E. CAPARROS and R. MORRISET, *loc. cit. supra*, note 56, 196-197; but see *Morin v. Gagnon*, C.S. Quebec, 4515-D, January 29, 1973, (J. MARQUIS where the judge recognized and estimated the value of the wife's work in the home).
86. Cf. art. 1266q, 1425h and 1438, *C.C.*
87. Cf. art. 224, para 1, *Fr. C.C.*
88. Cf. art. 161, para 2, *B.W.*
89. Cf. H. DESCHENAUX, "Revision du régime matrimonial", (1957) 79 *RDS (ZSR)* 459a-460a.
90. Cf. art. 12, para. 1, Ch. V, *G.B.*; A. SNAEVERR, *loc. cit. supra*, note 77, 251; art. 162, *B.W.*; *Req. 31 Oct. 1934*, D. 1935, 1, 73, note NAST; *Civ. 11 April 1964*, J.C.P. II. 13747, note VOIRIN and D. 1965. 273 note CORNU; *Civ. 19 Oct. 1964*, J.C.P. 1965. II. 14015, note PATARIN and D. 1965. 297, note R. SAVATIER; art. 220, *Fr. C.C.*; J. PATARIN and G. MORIN, *op. cit. supra*, note 63, Nos. 21-26, pp. 25-30; A. PONSARD, *op. cit. supra*, note 63, Nos. 13-16, pp. 8-9.
91. Cf. art. 220, para. 2, *Fr. C.C.*
92. Cf. art. 12, para. 2, Ch. V, *G.B.*
93. Cf. art. 220, para. 3, *Fr. C.C.*; art. 164, *B.W.*
94. Cf. POTHIER, *Traité de la puissance du mari*, No. 49, in *Oeuvres*, ed. BUGNET, Vol. 7. Paris, Cosse and Marechal-H. Plon, 1861, 20 and *Traité de la communauté*, No. 574, in *ibid.*, 301-302.
95. Cf. § 1357, *B.G.B.* and O. SANDROCK, *loc. cit. supra*, note 64, Nos. 44-46, pp. 298-300.
96. Cf. § 1360, *B.G.B.*
97. Cf. art. 180, *C.C.* and M. LASSONDE, "Du mandat tacite au mandat légal de l'article 180", (1964-65) 15, No. 13 *Thémis*, 56-57.
98. Cf. *Erigon v. Côté*, (1875) 1 Q.L.R. 152 (C.S. Trois-Rivières); *Hudon v. Marceau*, (1879) 23. L.C.J. (C.A. 1878); *Brow v. Guy*, (1881) 5 L.N. 111 (C. rev.); *Morgan v. Vibert*, (1906) 15 B.R. 407;

- Dufresne v. Brousseau*, (1916) 49 C.S. 67; *Côté v. McLaughlin*, (1925) 63 C.S. 439; *Guillemette v. Bourret*, (1926) 64 C.S. 482; *Posen v. Faubert*, (1930) 36 R. de J. 154 (C.S. Mtl.); *Gratton v. Hermann*, (1931) 69 C.S. 479; *Gallick v. Crawford*, (1931) 69 C.S. 490; *Desruisseau v. Hume*, (1933) 55 B.R. 508; *Gauthier v. Aubert*, (1939) 77 C.S. 396; *Baron v. Court*, (1939) 77 C.S. 428; *Lightstone v. Holmes*, (1940) 78 C.S. 45; *Pridham v. Ruel*, (1943) R.L. 389 (C.S. Mtl.); *Brown & Co. v. Marlowe* (1944) C.S. 61; *Lefebvre v. Labonté* (1944) C.S. 256; *Barrette v. Durocher*, (1945) C.S. 477; *Hôpital Ste-Jeanne d'Arc v. Prud'homme*, (1949) C.S. 487; *Aubé v. Desmeules*, (1952) R. L. 479 (C.S. Gaspé); *Dominion Furniture Co. v. Rill*, (1952) C.S. 395; *Pepin v. de la Chevrotière*, (1959) C.S. 603; *Brenner v. Hirsch* (1959) C.S. 79; *Dale and Co. v. Barnstone*, (1960) C.S. 52; *Gratton v. Dorfman*, (1960) C.S. 457; *Chez Bob Ltée v. Dolbec*, (1960) C.S. 419; *Elegance Ltd. v. Ellis* (1964) C.S. 530; *Woodhouse & Co. v. Blouin*, (1966) C.S. 456; *Patrice Loranger Ltée v. Cotton* (1967) R.L. 319 (C. prov.); *Larocque Ottawa Ltd. v. Therrien*, (1967) R.L. 563 (C. prov.); *T. Eaton Co. Ltd. of Montreal v. Egglefield*, (1969) C.S. 15; *Dupuis Frères Ltée v. Gauthier*, (1970) R.L. 178 (C. prov.); *M. Shuchat Fur Co. v. Pariseault*, (1972) C.A. 138.
99. Cf. J. PATARIN and G. MORIN, *op. cit. supra*, note 63, No. 23, pp. 27-28.
 100. Republic of Texas, *Act of January 26, 1839*, 1 Paschal Dig. L. art. 3798; cited in 40 C.J.S. *Homesteads* § 2, note 17; the first federal law dated 1862, cf. *ibid.*
 101. Cf. in an historical context, S. E. MORISON and H. S. COMMANGER, *The Growth of the American Republic*, Vol. 2, New York, Oxford University Press, 1962, pp. 280-282; and D. PERKINS and G. G. VAN DEUSEN, *The United States of America: A History*, Vol. 1, New York, Macmillan Co., 1962, pp. 680-684.
 102. Cf. *Federal Lands Act*, S.C. 1908, c. 20, which became R.S.C. 1927, c. 113 and repealed by the *Territorial Lands Act*, S.C. 1950, c. 22, art. 26. In Ontario, the *Free Grants and Homesteads Act*, 1868, which became *The Public Lands Act*, R.S.O. 1960, c. 234. Even though the regulation is slightly different, the *homestead* is also found in Quebec with respect to colonization, cf. *an Act to Protect Settlers*, S.Q. 1882, c. 12; after detailed amendments, this act is still included in our law: *Settlers Protection Act*, R.S.Q. 1964, c. 106, arts. 3 and 4.
 103. Cf. arts. 349-359, *Swiss C.C.*; *Loi du 12 juillet 1909* (France), *D.P.* 1910.4.1; *Ley 14.394 del 22 diciembre 1954* (Argentina), in *Código civil de la República Argentina*, Madrid, I.C.H., 1950, pp. 935-939.
 104. Cf. V. ROSSEL, *Code civil Suisse et Code fédéral des obligations*, 7th ed., by A. Rossel, Lausanne, Payot, 1948, note on page 130; J. LARGUIER, Vo "Biens de famille", in *Dalloz Répertoire civil*, No. 1, p. 470; S. CIFUENTES, "El bien de familia", (1962) 108 *La Ley*, *Revista jurídica Argentina* (Buenos Aires), p. 1053 and H. VACA NARVAJA, "El Patrimonia familiar", (1963) 27 *Bóletin*

de la Facultad de Derecho y Ciencias Sociales de Córdoba (Argentina), No. 23, pp. 344-346.

105. Cf. V. ROSSEL, *supra*, note 104; G. RIPERT and J. BOULANGER, *Traité de droit civil*, Vol. II, Paris, L.G.D.J., 1967, No. 1636, p. 597; H. VACA NARVAJA, *supra*, note 104.
106. Also *Loi du 1^{er} septembre 1948*, *J. O.* September 2, 1948, D. 1948. L. 300; *Loi du 19 décembre 1961*, *J.O.* December 20, 1961, D. 1962 L. 6 *J.C.P.* 1961. III. 22475; *Loi n° 62-902 du 4 août 1962*, *J.O.* August 7, 1962, D. 1962, L. 264.
107. It is impossible for us to study this question in detail within the framework of this paper. However, see A. REIG, "L'immeuble d'habitation dans le droit patrimonial de la famille" in J. CARBONNIER (ed.), *L'immeuble urbain à usage d'habitation*, Bib. dr. privé, Vol. 49, Paris, L.G.D.J., 1963, pp. 431-489 and Y. GUYON, "Le statut du logement familial en droit civil", *J.C.P.* 1966. I. 2041. With respect to the protection of the family by way of the protection of the residence in comparative law, see also E. CAPARROS, *op. cit. supra*, note 2, Nos. 107-134 and 158-165.
108. Cf. *Matrimonial Homes Act*, 1967, c. 75 (1967) 47 *Halisbury Statutes*, p. 781-789.
109. Cf. art. 164a, *B.W.*, as well as all the provisions of the first Dutch regime.
110. Cf. the studies of A. REIG and Y. GUYON, *supra*, note 107.
111. Cf. art. 175, *C.C.*
112. Cf. art. 1292, para. 2, *C.C.*
113. Cf. art. 1425a, para. 2, *C.C.*
114. Cf. art. 1292, para. 2, *C.C.*
115. Cf. art. 1425a, para. 2, *C.C.*
116. Cf. C.C.R.O., COMITÉ DU DROIT DES PERSONNES ET DE LA FAMILLE, *Rapport sur la protection de la résidence familiale*, No. XII, Montreal, typewritten, 1971.
117. We had mainly criticized the fact of having decided to regulate only a single element of the primary regime; see: E. CAPARROS, "Remarques sur l'avant-projet de protection de la résidence familiale", (1971) 12 *C. de D.* 315-328. Other criticisms have also been published see references, *ibidem*, 329.
118. For a more complete study of this question, see E. CAPARROS *op. cit. supra*, note 2, Nos. 311-338.
119. Cf. art. 164a, para. a), *B.W.*; art. 215, para. 3, *Fr. C.C.*
120. Cf. C.C.R.O., *op. cit. supra*, note 116, arts. 5 to 13.
121. Cf. art. 214, para. 4, *Fr. C.C.* and art. 864-1, *Fr. C.C.P.*; art. 5, Ch V, *G.B.*
122. Cf. art. 163, para. 1, *B.W.*
123. Cf. art. 163, *in fine*, *B.W.*; 864-1, *in fine*, *Fr. C.C.P.*
124. Cf. art. 166b, *B.W.*; art. 215, para. 3, *Fr. C.C.*

125. Cf. art. 1266q, *in fine*, art. 1425h and art. 1438, para. 2, *C.C.*
126. Cf. *C.C.R.O.*, *op. cit. supra*, note 116, arts. 4, 7, 13, 14.
127. Cf. art. 14, Ch. V, *G.B.*; arts. 164 and 164a, *B.W.*; art. 217, *Fr. C.C.*
128. Cf. art. 182, *C.C.*
129. Cr. art. 165, *B.W.*; art. 219, *Fr. C.C.* The main difference between this article and article 217, on which French doctrine insists, is that article 217 applies when the plaintiff spouse has incomplete powers, while Article 219 applies when the plaintiff spouse is deprived of powers. For a study of these techniques in French law, see A. CHO-TEAU, "Domaines d'application comparés des articles 217 et 219 du Code civil", *D.* 1949, chron. 93-94 and P. RAYNAUD, "L'habilitation judiciaire des époux depuis la loi du 22 sept. 1942", (1946) 33 *Rev. trim. dr. civ.* 1-19. Despite the amendments made to articles 217 and 219 by the reform of 1965, the substance of these texts remains unchanged, however, for the amendments made, cf. A. PONSARD, *op. cit. supra*, note, 63, Nos. 24-26, pp. 11-12 and art. 861, *Fr. C.C.P.* according to the wording of *D. No. 66-130 du 4 mars 1966*, *J.O.* March 6, 1966, 1915; *D.* 1966, L. 199.
130. Cf. art. 14, Ch. V, *G.B.*
131. Cf. art. 220-1, *C.C.*
132. Cf. arts. 12 and 13, Ch. V, *G.B.*
133. Cf. J. PATARIN and G. MORIN, *op. cit. supra*, note 63, No. 35, pp. 79-80.
134. Cf. art. 215, para. 1 and 2, *Fr. C.C.*, according to the wording of the *Loi No. 70-459 du 4 juin 1970*, *J.O.*, June 5, 1970. *D.* 1970.L. 138. For comments on this act, see C. COLOMBET, "Commentaire de la loi du 4 juin 1970 sur l'autorité parentale". *D.* 1971, chron. 1-29 and J. HAUSER and E. ABITBOL, "De 1964 à 1970. Les retombées de la loi 'relative à l'autorité parentale' sur les institutions tutélaires", *D.* 1971, chron. 59-70.
135. Cf. art. 161, para. 4, *B.W.*
136. For a more complete study on these questions, see E. CAPARROS, *op. cit. supra*, note 2, No. 166-184.
137. Cf. art. 1260, para. 1, *C.C.*
138. Cf. arts. 1258, 1259, *C.C.*
139. Cf. art. 1260, para. 2, *C.C.*
140. Cf. art. 1268, para. 2, *C.C.*
141. Cf. arts. 984 and 985, *C.C.*
142. Cf. art. 1262, *C.C.*
143. Cf. art. 1263, *C.C.*
144. Cf. arts. 833 and 834, para. 1, *C.C.*
145. Cf. art. 834, para. 2, *C.C.*
146. Cf. art. 1262, para. 2 and 1263 para. 3, *C.C.*
147. Cf. art. 1264, para. 1, *C.C.*

148. Cf. art. 1264, para. 2, C.C.
149. Cf. art. 1266b, C.C. and see *an Act respecting the central register of matrimonial regimes*, Q.L. 1969, c. 78 and G. BRIERE, "L'établissement du registre central des régimes matrimoniaux a-t-il modifié de quelque façon les règles de l'enregistrement des donations par contrat de mariage?" (1972) 32 *R. du B.* 270.
150. Art. 1266b, C.C. applies only to marriage contracts.
151. See form S.C.R.M.F.-1-70/JU-2045 (1).
152. Cf. arts. 804-806, C.C.
153. Cf. G. BRIERE, *loc. cit. supra*, note 150, 271.
154. Cf. art. 1260, para. 1, C.C. before the reform introduced by L.Q. 1969, c. 77. The community of moveables and acquests remains in the Code as a conventional regime (Cf. art. 1268, C.C.), a somewhat privileged regime (Cf. art. 1268, para. 1 C.C.)
155. Cf. art. 1260, para. 2, C.C.
156. Cf. art. 1272, C.C.
157. Cf. arts. 1275, 1276, 1277, C.C. We will examine these questions in greater detail in our study of the community of moveables and acquests.
158. Cf. art. 1266d, C.C.
159. Cf. art. 1266e, para. 2, C.C.
160. Cf. in general, K. D'OLIVECRONA, *loc. cit. supra*, note 18.
161. Cf. art. 1268, para. 3, C.C.
162. Cf., only as an example, art. 1297, C.C. and compare with art. 1297, C.C. according to the wording of 1964.
163. For a study of this question see E. CAPARROS, *op. cit. supra*, note 2, Nos. 192-223.
164. Cf. art. 1292, C.C. before the reform introduced by S.Q. 1930-31, c. 101.
165. Cf. art. 1297, C.C. before the reform introduced by S.Q. 1964, c. 66.
166. Cf. art. 1292, C.C.
167. Cf. *Act respecting the legal capacity of married women*, S.Q. 1964, c. 66.
168. Cf. art. 1266o, C.C.
169. Cf. art. 1266o, para. 1, *in fine*, C.C.
170. In this respect, see "Le problème de la mutabilité du régime matrimonial", in *Tx de l'Ass. H. Capitant*, Vol. VII, Montreal, Doucet, 1956, 297-489.
171. Cf. *Act respecting matrimonial regimes*, Bill 10, 1969, explanatory notes, n. 14; for a study of this question and of the criticisms made with respect to the preliminary draft, see E. CAPARROS, *loc. cit. supra*, note 39, 178-182, and references.
172. Cf. art. 1265, para. 1, C.C.

173. Cf. art. 1310, 3, *C.C.*, before the reform introduced by Q.L. 1969, c. 77.
174. Cf. art. 1311, *C.C.*, before the reform introduced by L.Q. 1969, c. 77.
175. Cf. art. 1312, *C.C.*, before the reform introduced by L.Q. 1969, c. 77.
176. Cf. *supra*, note 173.
177. Cf. art. 1179, *Swiss C.C.*
178. Cf. art. 178f and 194 and ff, *B.W.*
179. Cf. § 1432, *B.G.B.*
180. Cf. art. 1397, *Fr. C.C.*
181. Cf. H. TURGEON, "Rapport général", in *loc. cit. supra*, note 170, 442-445.
182. Cf. art. 1397, *Fr. C.C.*
183. Cf. art. 1265, *C.C.*
184. Cf. art. 1264, para. 1, *C.C.*
185. Cf. art. 1266, para. 1, *C.C.*
186. Cf. *Quebec Chamber of Notaries*, (1971) C.S. 488.
187. Cf. *id*, 496.
188. Cf. art. 1266, para. 2, *C.C.*
189. *Act to amend the Civil Code*, Q.L., 1972, Bill 49, art. 8.
190. Cf. art. 1266, para. 2, *C.C.*
191. Cf. art. 1266, para. 2, *in fine*, *C.C.*
192. Cf. art. 1266, para. 1, *C.C.*
193. Cf. art. 1266a, para. 2, *C.C.*
194. Cf. art. 1266a, para. 1, *in fine*, *C.C.* and see also art. 1834, para. 3, *C.C.*
195. Cf. *supra*, No. 52.
196. Cf. art. 1266b, *C.C.* and see *Act respecting the central register of matrimonial regimes*, L.Q. 1969, c. 78, which adds a section to the *Justice Department Act*, S.Q. 1965, 1st session, c. 16.
197. Cf. art. 1266b, *C.C.*
198. Cf. *An Act to again amend the Code of Civil Procedure*, Q.L. 1969, c. 81, art. 22, modifying sec. 817, *C.C.P.*
199. Cf. *supra* No. 52.
200. Cf. art. 1261, *C.C.*
201. Cf. art. 1266b, *C.C.*
202. Cf. art. 1261, *in fine*, *C.C.*
203. Cf. R. COMTOIS, "Les principales dispositions du Bill 10" in CHAMBRES DES NOTAIRES, *Cours de perfectionnement*, Montreal, 1970, 120; *ID*, "Le Bill 10 depuis le premier juillet 1970", (1970) 1 *R.G.D.* 227-228; *ID*, "Les incidences fiscales de la Loi concernant les régimes matrimoniaux", in CHAMBRE DES NOTAIRES, *Cours de perfectionnement*, Montreal, 1971, 115-116.

204. Cf. E. CAPARROS, "Loi concernant les régimes matrimoniaux", (1970) 11 *C. de D.* 315-316.
205. Cf. art. 1268, *C.C.*
206. Cf. R. COMTOIS, "Le Bill 10 . . .", *loc. cit. supra*, note 203, 228; *ID*, "Les incidences . . .", *loc. cit. supra*, note 203, 115.
207. Cf. E. CAPARROS, *loc. cit. supra*, note 39, 178-182.
208. Cf. *supra* Nos. 58 to 64.
209. Cf. L. P. PIGEON, *Rédaction et interprétation des lois*, Quebec, 2nd ed., 1965, 46.
210. Cf. art. 1266r, 2, *C.C.*
211. Cf. art. 1310, *C.C.*
212. Cf. art. 1267c, para. 1, *C.C.*
213. Cf. art. 1361, *C.C.*
214. Cf. art. 1442, para. 1, *C.C.*
215. To our knowledge, no judgment published has raised this question.
216. Cf. art. 1397, *Fr. C.C.*
217. Cf. E. CAPARROS, *loc. cit. supra*, note 39, 117-118, and 180-181; *ID*, *loc. cit. supra*, note 204, 317; J. PINEAU, *op. cit. supra*, note 37, 41
218. See COMMISSION DES DROITS CIVILS DE LA FEMME, *Pre-mier rapport des commissaires*, Quebec, 2nd ed., 1930; *ID*, *Deuxième rapport des commissaires*, Quebec, 2nd ed., 1930 and *ID*, *Troisième rapport des commissaires*, Projets d'amendements aux codes et aux statuts, (1930-31), 9 *R. du D.* 337-359.
219. Cf. *An Act to amend the Civil Code and the Code of Civil Procedure respecting the civil rights of women*, S.Q. 1930-31, c. 101.
220. Cf. arts. 1425a-1425i, *C.C.* according to the wording of 1931.
221. We will study reserved property in further detail in our study of the communities, the only regimes under which such property still exists today. However, for a study on reserved property as it existed at the time, see M. COTE, "Des biens réservés de la femme mariée", (1943)-44) 46 *R. du N.* 209-231; P. B. MIGNAULT, "Biens réservés de la femme mariée", (1941) 1 *R. du B.* 30-32; L. TREMBLAY, *Les biens réservés de la femme mariée*, Montreal, Wilson and Lafleur, 1946.
222. Cf. art. 1292, *C.C.* according to the wording of 1931.
223. Cf. art. 180, *C.C.* according to the wording of 1931.
224. Cf. art. 1422, *C.C.* according to the wording of 1931.
225. Cf. art. 210, *C.C.* according to the wording of 1931.
226. Cf. arts. 1389a, 1389b, *C.C.*
227. See C.C.R.O., *Rapport sur la capacité juridique de la femme mariée*, Montreal, Editeur Officiel du Québec, 1964.
228. Cf. *An Act respecting the legal capacity of married women*, S.Q. 1964, c. 66.

229. For a study of the reforms introduced by this act, cf. J. L. BAUDOIN, "Examen critique de la réforme de la femme mariée québécoise", (1965) 43 *R. du B. Can.* 393-413; G. BRIERE, "Le nouveau statut juridique de la femme mariée", *Lois Nouvelles*, Montreal, P.U.M., 1965 7-29; R. COMTOIS, "Commentaires sur la 'Loi sur la capacité juridique de la femme mariée' (bill 16)", (1964-65) 67 *R. du N.*, 103-132; *ID*, "Les époux communs en biens depuis le Bill 16", *Lois Nouvelles*, Montreal, P.U.M., 1965, 31-50; C. LOMBOIS, "La condition juridique de la femme mariée", (1965-66) 68 *R. du N.* 457-484, 527-539 and (1966-67) 69 *R. du N.* 98-118 and 165-190.
230. For example, cf. art. 1292 and 1297, *C.C.* according to the wording of 1964.
231. *Ibidem*.
232. Cf. art. 1425a and ff., *C.C.* according to the wording of 1964.
233. See C.C.R.O., *Rapport sur les régimes matrimoniaux*, Montreal, Editeur Officiel du Québec, 1968.
234. Cf. *An Act respecting matrimonial regimes*, Q.L. 1969. c. 77.
235. Cf. *id.*, art. 100.
236. Cf. *supra*, Nos. 57-67.
237. Cf. art. 1260, para. 2, *C.C.*
238. Cf. art. 1260, para. 1, *C.C.*, before the 1969 reform.
239. Cf. art. 1266c, *C.C.*
240. Cf. C.C.R.O., *Rapport du Comité des régimes matrimoniaux*, Montreal, duplicated, 1966, arts. 1268-1277, pp. 31-35 and for an analysis of this situation, see E. CAPARROS, *loc. cit. supra*, note 39, 163-164.
241. For a study of these criticisms, see E. CAPARROS, *loc. cit. supra*, note 39, 164-167.
242. Cf. C.C.R.O., *op. cit. supra*, note 233, Introduction, n. 10, pp. 12-15, and, in particular note 1 on pp. 14-15.
243. Cf. *ID.*, art. 1269, p. 40.
244. Cf. art. 1266d, *C.C.*
245. Cf. art. 1266e, 1, *C.C.*
246. Cf. *supra*, Nos. 65-67.
247. Cf. art. 1266m, *C.C.*
248. Cf. art. 1233, 2, *C.C.*
249. Cf. *id.*, 7, *C.C.*
250. Cf. *Manuel du Notaire*, Vol. 1, 1970, 110-113.
251. For example, cf. art. 1275, *C.C.*
252. Cf. art. 1266e, 2, *C.C.*
253. Cf. art. 1266e, 2, *in fine*, *C.C.*
254. Cf. art. 1266d, 2, *C.C.*
255. Cf. art. 1266e, 3, *C.C.*

256. Cf. art. 1266d, 2, *C.C.*
257. Cf. art. 1266e, 4, *C.C.*
258. Cf. art. 1266o, para. 1, *in fine*, *C.C.*
259. Cf. art. 1266e, 5, *C.C.* and for a relatively complete study of the questions raised by this article, see L. PLAMONDON, "La société d'acquêts et l'assurance sur la vie", (1970-71) 73 *R. du N.* 131-153 and 248-266. In spite of the title of the article, the author raises a number of questions on other articles regulating the partnership of acquests and dealing with insurance.
260. Cf. L. PLAMONDON, *loc. cit. supra*, note 259, 135-146.
261. Cf. art. 1266h, para. 1, *C.C.*
262. Cf. art. 1266h, para. 2, *C.C.*
263. Cf. art. 1266h, para 1, *in fine*, *C.C.*
264. In this regard, see the discussion of this article—which bore number 1266h at the time—in the Parliamentary Commission in *Debates of the National Assembly*, 4th Session, 28th Leg., Commission on the Administration of Justice (hereinafter called *Commission*), 3345-3347.
265. Cf. L. PLAMONDON, *loc. cit. supra*, note 259, 264-266.
266. Cf. art. 1266h, para. 1, *C.C.*
267. Cf. art. 1266h, para. 2, *C.C.*
268. Art. 1266i, *C.C.*
269. Art. 1266i, *C.C.*
270. Cf. *supra*, note 264.
271. Cf. art. 414, para. 1, *C.C.*
272. Cf. arts. 429 and ff, *C.C.*
273. Cf. art. 1472, para. 2, *C.C.*
274. Cf. art. 1266m, *C.C.*
275. For example, cf. art. 1266i, *C.C.*
276. Cf. art. 1267, para. 2, *C.C.*
277. Cf. *ibidem*.
278. Cf. *supra*, n. 76.
279. Cf. E. CAPARROS, *loc. cit. supra*, note 39, 159-160.
280. Cf. art. 1274, *C.C.*
281. Cf. art. 1272, 3, *C.C.*
282. Cf. art. 1266k, *C.C.*
283. Cf. art. 1266h, *C.C.*
284. Cf. art. 1266l, *C.C.*
285. Cf. *supra*, Nos. 86 and 88.
286. Cf. *supra*, Nos. 90-94.
287. Cf. *supra*, n. 79.
288. Cf. art. 1267d, para. 2, *C.C.*
289. Cf. art. 1266o, para. 1, *C.C.*

290. Cf. *An Act respecting matrimonial regimes*, Bill 10 (assented to) of 1969, explanatory notes, n. 10, p. VII and p. 7a.
291. Cf. P. A. CREPEAU, "Les principes fondamentaux de la réforme des régimes matrimoniaux", in *Lois Nouvelles II*, Montreal, P.U.M., 1970, p. 11.
292. Cf. E. CAPARROS *loc. cit. supra*, note 39, 168-171 and references.
293. Cf. POTHIER, *Traité des donations entre époux*, Nos. 34-35, in *Oeuvres*, *cit. supra*, note 94, p. 462.
294. Cf. *Fry v. O'Dell*, (1897) 12 C.S. 263 (C. rev.); *Eddy v. Eddy*, [1900] A.C. 299, conf. (1898) 7 B.R. 300; *Mastin v. Geavy*, (1943) C.S. 149; *Parker v. Betts*, (1955) R.P. 364 (C.S. Mtl.).
295. Cf. *Dery v. Paradis*, (1910) 10 B.R. 227; *Boivin v. Larue*, (1925) 39 B.R. 87; *Quesnel v. Quesnel* (1966) B.R. 141.
296. Cf. *Goulet v. Gratton*, (1915) 47 C.S. 465 (C. rev.); *Raymond v. Bolduc*, (1961) C.S. 236; *Roy v. Marcheterre*, (1962) C.S. 13.
297. In this regard, cf. the remarks by Luc PLAMONDON, in *Commission*, 3543.
298. Cf. *ibidem*, 3543-3544, 3725-3726.
299. Cf. the statement by P. A. CREPEAU, *ibidem*, 3725.
300. Cf. E. CAPARROS, *loc. cit. supra*, note 39, 170-171 and references.
301. Cf. G. BRIERE, "Les dispositions essentielles du Bill 10 sur les régimes matrimoniaux", in *Lois Nouvelles II*, Montreal, P.U.M., 1970, p. 27.
302. Cf. *supra*, note 37 and references.
303. Cf. *supra*, note 94.
304. Cf. *supra*, note 98.
305. Cf. *supra*, note 37.
306. Cf. arts. 177 and 180, *C.C.*, wording of 1866.
307. Cf. J. CARBONNIER, *op. cit. supra*, note 4, n. 112, pp. 359-360 where he studies the mandate under French law before the 1965 reform. Dean Carbonnier analyses the legal mandate in a paragraph entitled: "Rapports de hiérarchie", *id.* n. 110, p. 352.
308. We have listed the decisions in chronological order, *supra*, note 98.
309. Cf. *Pridham v. Ruel*, (1943) R.L. 389 (C.S. Mtl.); *Chez Bob Ltée v. Dolbec* (1960) C.S. 419; *Larocque Ottawa Ltd. v. Therien* (1967) R.L. 563 (C. prov.).
310. Cf. *Gallick v. Aubert*, (1939) 77 C.S., 396; *Dale and Co. v. Barnstone*, (1960) C.S. 52; *M. Chuchat Fur Co. v. Pariseault*, (1972) C.A. 138.
311. Cf. *Pepin v. de la Chevrotière*, (1959) C.S. 503.
312. Cf. *Gratton v. Dorfman*, (1960) C.S. 457.
313. Cf. *Hôpital Ste-Jeanne d'Arc v. Prud'homme*, (1949) C.S. 487.
314. Cf. *Brown & Co. v. Marlowe* (1944) C.S. 61; *Lefebvre v. Labonté*, (1944) C.S. 256.

315. Cf. *Gratton v. Hermann*, (1931) 69 C.S. 479; *Barrette v. Durocher*, (1945) C.S. 477; but see *contra*: *Bremer v. Hirsch*, (1959) C.S. 79.
316. Cf. *Morgan v. Vibert*, (1906) 15 B.R. 407; *Posen v. Faubert*, (1930) 36 R. de J. 154 (C.S. Mtl.); *Baron v. Court*, (1939) 77 C.S. 428; *Dominion Furniture Co. v. Rill* (1952) C.S. 395; *Woodhouse & Co. v. Blouin*, (1966) C.S. 456; but see *contra*: *Dupuis Frères Ltée v. Gauthier*, (1970) R.L. 178 (C. prov.), a decision which seems equitable to us.
317. Cf. *Deruisseau v. Hume*, (1933) 55 B.R. 508; *Lightstone v. Holmes*, (1940) 78 C.S. 45.
318. Cf. *Côté v. McLaughlin*, (1925) 63 C.S. 439 and *Chez Bob Ltée v. Dolbec*, *cit. supra* note 309.
319. Cf. *Hôpital Ste-Jeanne d'Arc v. Prud'homme*, *cit. supra* note 313.
320. For a more complete study of this question, see E. CAPARROS, *op. cit. supra*, note 2, Nos. 276-288 and references.
321. Cf. *supra*, Nos. 32-34.
322. Cf. with respect to divorce, *Morin v. Gagnon*, *cit supra*, note 85. See also M. RIVET, "Pension alimentaire et divorce: des Cours d'appel à la Cour suprême, le casse-tête des tribunaux", (1972-73) 78 *R. du N.* 683 and his remarks regarding this judgment in note 52.
323. Cf. art. 1266q, *in fine*, C.C.
324. Cf. *C.P.R. Co. v Kelly*, (1952) 1 R.C.S. 52), *speciatim* J. TASCHE-REAU, pp. 539-541 where he reviews the *Bruneau v. Barnes* case, approving it, (1880) 25 L.C.J. 245 (C.A.).
325. Cf. *Valigney v. Simard*, (1896) 3 R. de J. 294 (C.S. Joliette); *Blain v. Farley*, (1937) 63 B.R. 43; *Riddell v. Love*, 1972 C.A. 621, *conf.* C.S. Quebec, 123-596, 21 January 1968, J. DORION.
326. Cf. *supra*, Nos. 75-103.
327. Cf. arts. 66 and ff. C.C.
328. Cf. arts. 70-73, C.C. and E. DELEURY, "La loi concernant les jugements déclaratifs de décès", (1970) 11 *C de D.* 330.
329. Cf. art. 73, para. 3, C.C.
330. Cf. art. 217, C.C. according to the wording of 1931.
331. Cf. art. 217, C.C.
332. Cf. art. 109, C.C.
333. Cf. art. 98, C.C.
334. Cf. art. 101, C.C.
335. Cf. arts. 200 and 212, C.C. modified by the *Act to amend the Civil Code*, L.Q. 1969, c. 74, arts. 9 and 14; A. MAYRAND, "L'obligation alimentaire entre époux séparés ou divorcés depuis le Bill 10 et la Loi fédérale sur le divorce", *Lois Nouvelles II*, Montreal P.U.M., 1970, 41-64; M. RIVET, *loc. cit. supra*, note 322, 670-689.
336. Cf. art. 208, C.C. modified by Q.L. 1969, c. 74, art. 12; A. MAYRAND' "Quelques effets du nouvel article 208 du Code civil (Bill 8, art. 12) sur les rapports pécuniaires entre époux", in CHAMBRE

- DES NOTAIRES, *Cours de perfectionnement*, Montreal, 1970, 137-172.
337. Cf. A. MAYRAND, *loc. cit. supra*, note 336, 140 and references.
338. Cf. art. 211, para. 2, C.C. according to the wording of Q.L. 1969, c. 74, art. 14.
339. Cf. *An Act to again amend the Code of Civil Procedure*, Q.L. 1969, c. 81, effective July 1, 1970.
340. Cf. A. MAYRAND, *loc. cit. supra*, note 336, 143-147.
341. Q.L. 1969, c. 74.
342. Cf. A. MAYRAND, *loc. cit. supra*, note 336, 158-160; G. BEAUPRE, "Le Bill 8 de 1969 -vs- La Loi sur le divorce", *Barreau '70* Vol. 2, n. 7, p. 7; F. HELEINE, "Note sous *Klemka v. Klemka et Hachy v. Ratelle*", (1970) 1 *R.G.D.* 383-390; G. DUPRA-BERGERON and A. BERGERON, "De la compétence du tribunal relativement aux effets du divorce sur les donations par contrat de mariage", (1972) 7 *R.J.T.* 155-167; E. DELEURY and M. RIVET, *Droit civil. Droit des personnes et de la famille*, Book II: *La famille*, Quebec, P.U.L., 1973, pp. 278-285 and references, and see also their bibliography on pp. 315-317.
343. The competence of the Superior Court to decide, in a petition for divorce, on matters relating to the custody of children and allowances, seems to have been established by *Corbeil v. Daoust*, 1972 C.A. 375, conf. *A. v. B.*, (1970) C.S. 642. These decisions also considered the constitutionality of articles 10 and 11 of the *Divorce Act*. In this respect, see *Jackson v. Jackson*, (1972) 6 *W.W.R.* 419 (C.S. Can.) and *Zaks v. Zaks*, Supreme Court, May 7, 1973 (not reported).
344. Cf. *supra*, n. 129, *in fine*.
345. For example, cf. G. BEAUPRE, *loc. cit. supra*, note 342.
346. Cf. *Corbeil v. Daoust*, *cit. supra*, note 343, J. TASCHEREAU on p. 379; *A. v. B.*, *cit. supra*, note 343, J. PUDDICOMBE pp. 651-652; *Klemka v. Klemka*, (1971) C.S. 18, on p. 20; *Lautin v. Lautin*, (1972) C.S. 430, on pp. 431-432.
347. *A. v. B. cit. supra*, note 343.
348. Cf. *Corbeil v. Daoust*, *cit. supra*, note 343, p. 379.
349. In this regard, cf. A.F. BISSON, "Les tendances récentes de la jurisprudence québécoise en matière de divorce", (1973) 33 *R. du B.* 283; E. DELEURY and M. RIVET, *op. cit. supra*, note 342, pp. 382-384.
350. Cf. F. HELEINE, *loc. cit. supra*, note 342, p. 271, note 1.
351. Cf. *Klemka v. Klemka* (1970) C.S. 438; *Klemka v. Klemka*, *cit. supra*, note 346, on p. 21.
352. Cf. G. BRIERE, "Le mariage putatif", (1960) 6 *McGill L.J.* 217-228, spec. 224-227; E. DELEURY and M. RIVET, *op. cit. supra*, note 342, pp. 119-123.

353. Cf. *Morin v. La Corporation des pilotes*, (1882) 8 Q.L.R. 223; *Stephens v. Falchi*, (1938) R.C.S. 354.
354. Cf. *Bourgault v. Devost*, (1972) C.S. 16.
355. Cf. *supra*, Nos. 58-64.
356. Cf. *supra*, Nos. 65-67.
357. Cf. E. CAPARROS and R. MORRISET, *loc. cit. supra*, note 56, pp. 188-189.
358. Cf. C.C.R.O., *op. cit. supra*, note 240, p. 122; C.C.R.O. *op. cit. supra*, note 233, p. 139.
359. Cf. *Commission*, 3897.
360. Cf. E. CAPARROS and R. MORRISET, *loc. cit. supra*, note 56, p. 189, note 98.
361. Cf. P. ROBERT, *Le petit Robert*, Paris, Société du Nouveau Littré, 1970, V^o Ménage, p. 1068.
362. For example, cf. *Commission*, pp. 3750-3751.
363. Cf. old arts. 1312 and 1314, C.C.
364. *An Act respecting matrimonial regimes*, Bill 10, 1969, first reading, art. 1266u, para 2.
365. Cf. *Commission*, pp. 3731-3734.
366. Cf. *id.* p. 3734, 2nd col.
367. Cf. *An Act respecting matrimonial regimes*, Bill 10, 1969, assented to December 12, 1969, art. 1266t, para. 2.
368. Cf. This reprint had been proposed by the then Minister of Justice, Mr. Rémi Paul, cf. *Commission*, p. 3906.
369. Cf. J. PINEAU, *op. cit. supra*, note 37, p. 53.
370. Cf. art. 1339, C.C. containing an identical provision for the community of moveables and acquests.
371. Cf. C.C.R.O., *op. cit. supra*, note 233, art. 1291, pp. 52 and 54.
372. Cf. art. 653, C.C.
373. Cf. *An Act to amend the Civil Code respecting successions*, S.Q. 1915, c. 74, art. 5.
374. Cf. P.A. CREPEAU, *Commission*, p. 3741.
375. Cf. R. COMTOIS, *Commission*, pp. 3740-3741, and L. MARCEAU, *ibid.*, p. 3243-3244.
376. Cf. L. MARCEAU, *ibidem*.
377. Cf. R. COMTOIS, "Les principales..." *cit. supra*, note 203, pp. 106-107; *ID*, "Commentaires sur le Bill 10, Loi concernant les régimes matrimoniaux", *Manuel du Notaire*, Vol 1, Montreal, duplicated, 1970, n. 25, pp. 90-91; *ID*, "Le Bill 10..." *cit. supra*, note 203, pp. 226-227; *ID*, "Les incidences..." *cit. supra*, note 203, pp. 113-114; A. MAYRAND, *Traité élémentaire de droit civil: les successions ab intestat*, Montreal, P.U.M. 1971, n. 158a, pp. 135-136 and n. 162a, pp. 139-140.
378. Cf. R. COMTOIS, "Le Bill 10..." *cit. supra*, note 203, p. 227.

379. Cf. R. COMTOIS, "Les principales..." *cit. supra*, note 203, pp. 106-107; *ID*, "Commentaires..." *cit. supra*, note 377, n. 25, p. 91; A. MAYRAND, *op. cit. supra*, note 377, n. 158a, p. 136.
380. In this regard, cf. art. 1266z, *C.C.*
381. Cf. G. BRIERE, *loc. cit. supra*, note 301, pp. 28-29; *ID*, *Les successions "ab intestat"*, 4th ed., Montreal, Cours de Thémis, 1972, pp. 32-33; J. PINEAU, *op. cit. supra*, note 37, p. 55; E. CAPARROS, *op. cit. supra*, note 2, n. 307, note 953.
382. Cf. *supra*, Nos. 93-94.
383. Cf. arts. 689 to 711, *C.C.*
384. *Act respecting matrimonial regimes*, Bill 10, 1969, assented to, p. 13a.
385. C.C.R.O., *op. cit. supra*, note 240, pp. 44 and 46.
386. Cf. C.C.R.O., *op. cit. supra*, note 233, p. 57.
387. Cf. *An Act respecting matrimonial regimes*, Bill 10, 1969, assented to, pp. 13a and 14a.
388. Cf. *Commission*, pp. 3743-3747.
389. Cf. E. CAPARROS and R. MORISSET, *loc. cit. supra*, note 56, pp. 190-192.
390. Cf. *Commission*, pp. 3743-3747.
391. Cf. *supra*, note 146.
392. In this regard, cf. *Sura v. M.N.R.* (1962) R.C.S. 65, and A. MAYRAND, "Commentaires", (1962) 40 *R. du B. Can.* 256, and references, see also R. COMTOIS, *op. cit. supra*, note 19, Nos. 11-18, pp. 23-56 and references.
393. For greater convenience we will ordinarily use the word community in this chapter to refer to the community of moveables and acquets. For a study of this community before the 1964 reform, see R. COMTOIS, *op. cit. supra*, note 19; in spite of these reforms, many concepts relating to this regime remain unchanged.
394. Cf. E. BIRON, "La femme et notre droit civil", (1920-21) 23 *R. du N.* 89-96 and 127-128; P. PAQUETTE, "Notre régime de séparation de biens", *ibid.*, 121-126; F. COULOMBE, "De nos régimes matrimoniaux", *ibid.*, 161-168; P. PAQUETTE, "Nos régimes matrimoniaux", *ibid.*, 250-256 and 279-283; F. COULOMBE, "De nos régimes matrimoniaux", *ibid.*, 272-275; J. E. DUPONT, "A propos de nos régimes matrimoniaux", *ibid.*, 353-356; R. FARIBAUT, J. H. A. BOHEMIER and P. PAQUETTE, "Projet de contrat de mariage comportant communauté réduite aux acquêts", *ibid.*, 356-357; F. COULOMBE, "La communauté réduite aux acquêts", (1921-22) 24 *R. du N.* 36-40; M. GERIN-LAJOIE, *La communauté légale*, no address, no pub., no date (but compilation of articles published in 1927), pp. 14-16.
395. Cf. R. COMTOIS, *op. cit. supra*, note 19, Nos. 371-377, pp. 317-324.
396. Cf. art. 1268, para. 3, *C.C.*

397. Cf. P. B. MIGNAULT, *Le droit civil canadien*, Vol. 6, Montreal, Théoret, 1902, pp. 154-155.
398. Cf. R. COMTOIS, *op. cit. supra*, note 19, n. 39a, pp. 69-70.
399. Cf. L. P. SIROIS, "Immeubles exclus de la communauté", (1914-15) 17 *R. du N.* 232-239; V. JORON, "De l'interprétation ou de l'application des articles 1275 et 1276 du Code civil", (1931-32), 34 *R. du N.* 199-209; A. MAYRAND, "Commentaires sur trois mots: succession, titre équipollent", (1957-58) 60 *R. du N.* 435-448. J. PINEAU, *op. cit. supra*, note 37, p. 79, but see, *contra*, F. LANGE-LIER, *Cours de droit civil de la province du Québec*, Vol. 4, Montreal, Wilson & Lafleur, 1908, pp. 295-296, and *Traité de droit civil du Québec*, Vol. 10, by L. FARIBAULT, Montreal, Wilson & Lafleur, 1952, pp. 105-106.
400. For applications of this article, cf. *Pollico v. Elvidge* (1869) 13 L.C.J. 333 (C.S. Mtl.); *Monnet v. Brunet* (1889) 17 R.L. 681 (C.S. Mtl.); *Bourassa v. Bourassa* (1907) 32 C.S. 533, and see also L. P. SIROIS, v. JORON and A. MAYRAND, *ut. supra*, note 401, and G. H. GOUIN, "En marge de l'article 1276 du Code civil", (1954-55) 57 *R. du N.* 670-672.
401. Cf. P. B. MIGNAULT, *op. cit. supra*, note 397, pp. 156-158, and for applications of this article, cf. *Boucher v. Thibaudeau* (1898) 13 S.C. 394 (App. Bd. 1897); *Paget v. Bourget* (1896) 2 *R. de J.* 398 (S.C. Percé), and A. BEAUDRY, "Mémoire", (1900) 6 *R. de J.* 177-198 (this was a brief by plaintiff's counsel for purposes of appeal).
402. Cf. art. 460, C.C.
403. Cf. art. 1279a, C.C.
404. Cf. POTHIER, *Traité de la communauté*, n. 569 in *op. cit. supra*, note 94, p. 300.
405. R. COMTOIS, *op. cit. supra*, note 19, n. 33, pp. 65-66.
406. In this respect, of J. PINEAU, *op. cit. supra*, note 37, p. 78.
407. Cf. R. COMTOIS, *op. cit. supra*, note 19, n. 31, pp. 64-65; J. PINEAU, *op. cit. supra*, note 37, p. 78; F. HELEINE, "Obligation alimentaire et régime communautaire", (1968) 14 *McGill L. J.* 317-318.
408. Cf. *St. Amand v. Jean* (1931) 34 R.P. 28 (C.S. Mtl.).
409. Cf. *Lemster v. Matieshyn* (1972) R.P. 1, comments by F. HELEINE, "Pensions de retraite et régimes communautaires", (1971-72) 74 *R. du N.* 97-106; *Bilodeau v. Turcotte-Bilodeau* (1972) C.S. 358.
410. *Lemster v. Matieshyn*, *cit. supra*, note 409, p. 3.
411. *Bilodeau v. Turcotte-Bilodeau*, *cit. supra*, note 409, p. 360.
412. *Lemster v. Matieshyn*, *ut. supra*, note 409, p. 6.
413. *Ibid.* pp. 6-7.
414. Cf. F. HELEINE, *loc. cit. supra*, note 409, pp. 102-104; see also H. TURGEON, "Récompenses et communauté", (1936-37) 39 *R. du N.* 480-481.
415. Cf. F. HELEINE, *loc. cit. supra*, note 411, pp. 104-106.

416. In this respect, cf. J. PINEAU, *op. cit. supra*, note 37, p. 78.
417. A similar solution was apparently proposed in 1965 by G. BRIERE, *Les régimes matrimoniaux*, duplicated, 1965, p. 172 (cited by F. HELEINE, *loc. cit. supra*, note 407, p. 318). We were unable to consult this text which was prepared at that time for students.
418. Cf. (1865) 29 Vict. c. 17, now R.S.Q. 1964, c. 296.
419. For examples, cf. P. B. MIGNAULT, *op. cit. supra*, note 397, p. 154; J. SIROIS, "Communauté—Police d'assurance sur la vie du mari", (1912-13) 15 *R. du N.* 181-187; A. BERNIER, "Les droits des bénéficiaires dans les assurances sur la vie", (1926-27) 5 *R. de D.* 520; E. RIVARD, "La loi des droits sur les successions et le contrat d'assurance sur la vie", (1930-31) 33 *R. du N.* 377-378; A. LAVALLEE, "Loi de l'assurance des maris et des parents", (1932-33) 35 *R. du N.* 536-638; R. MORIN, "L'assurance-vie dans la communauté de biens", (1948-49) 51 *R. du N.* 365-374; R. COMTOIS, *op. cit. supra*, note 19, n. 24, p. 61.
420. For applications by the courts, cf. *Labelle v. Barbeau* (1889) 33 L.C.J. 252, 20 R.L. 607 (C.A. 1888); *De Grandmont v. Société des artisans* (1899) 15 C.S. 145, aff. by (1899) 16 C.S. 532 (C. rev.); *Scott v. Sun Life Assurance Co.* (1932) 38 *R. de J.* 18 C.S. Mtl.; *Bernier-Fregeau v. M.N.R.* (1956) R.C. de l'E. 421; *Lalonde v. Chaput* (1964) C.S. 446.
421. Cf. H. TURGEON, "Communauté et propriété littéraire", (1936-37) 39 *R. du N.* 383-385; R. COMTOIS, *op. cit. supra*, note 19, n. 35, pp. 66-67.
422. Cf. *supra*, note 88.
423. Cf. P. B. MIGNAULT, *op. cit. supra*, note 397, pp. 167-168; H. TURGEON, "Communauté de biens et échanges de propres", (1950-51) 53 *R. du N.* 563-568, and references; R. COMTOIS *op. cit. supra*, note 19, n. 43a, pp. 72-73.
424. Cf. P. B. MIGNAULT, *op. cit. supra*, note 397, p. 168; R. COMTOIS, *op. cit. supra*, note 19, n. 43a, p. 73.
425. Cf. *Legault v. Schetagne* (1930) 48 B.R. 313; *Acton Vale Silk Mills Ltd. v. Lalancette* (1941) 79 C.S. 226; *Forcier v. Forcier* (1942) C.S. 308.
426. Cf. POTHIER, *op. cit. supra*, note 404, n. 197, pp. 134-135.
427. Cf. P. B. MIGNAULT, *op. cit. supra*, note 397, p. 159; R. COMTOIS, *op. cit. supra*, note 19, n. 436, pp. 73-74.
428. Cf. P. B. MIGNAULT, *op. cit. supra*, note 397, p. 153.
429. Cf. R. COMTOIS, *op. cit. supra*, note 19, Nos. 321, 322, pp. 285-286.
430. POTHIER, *op. cit. supra*, note 404, n. 197, p. 134 and see also art. 1357, 2, C.C.
431. P. B. MIGNAULT, *op. cit. supra*, note 397, p. 233.
432. Cf. POTHIER, *op. cit. supra*, note 404, n. 198, pp. 134-135; P. B. MIGNAULT, *op. cit. supra*, note 397, p. 235; R. COMTOIS, *op. cit. supra*, note 19, n. 45, pp. 74-75; *Legault v. Schetagne* (1930) 48 B.R. 313; *Forcier v. Forcier* (1942) C.S. 308.

433. Cf. R. COMTOIS, *op. cit. supra*, note 19, n. 45, pp. 74-75; see *contra*, POTHIER, *op. cit. supra*, note, 404 n. 198, p. 135; P. B. MIGNAULT, *op. cit. supra*, note 397, p. 234.
434. Authors have considered this question: cf. POTHIER, *op. cit. supra*, note 404, Nos. 199-201, pp. 135-138, P. B. MIGNAULT, *op. cit. supra*, note 397, pp. 235-238; R. COMTOIS, *op. cit. supra*, note 19, Nos. 46-47a, pp. 75-76.
435. Cf. POTHIER, *op. cit. supra*, note 404, n. 198, pp. 134-135; P. B. MIGNAULT, *op. cit. supra*, note 397, pp. 239-340; R. COMTOIS, *op. cit. supra*, note 19, n. 48, pp. 77-78.
436. Cf. art. 452, C.C.
437. Cf. art. 1297, C.C., 1964 wording.
438. Cf. art. 1297, C.C.
439. See *contra* J. PINEAU, *op. cit. supra*, note 37, p. 72.
440. Cf. POTHIER, *op. cit. supra*, note 404, Nos. 593-601, pp. 311-315.
441. Cf. *supra*, n. 162.
442. Cf. R. COMTOIS, *op. cit. supra*, note 19, n. 21, pp. 59-60.
443. Cf. arts. 383-398; C.C.; see also POTHIER, *op. cit. supra*, note 404, Nos. 25-104, pp. 65-96.
444. Cf. arts. 1425a and ff. C.C.
445. For example, cf. *Bonin v. Banque d'Épargne* (1923) 34 B.R. 322.
446. Cf. *infra*, section 2.
447. Cf. *infra*, Nos. 209-211.
448. Cf. J. PINEAU, *op. cit. supra*, note 37, pp. 74-75.
449. Cf. C.C.R.O., *op. cit. supra*, note 233, pp. 83 and 85.
450. Cf. *infra*, n. 212.
451. Cf. *supra*, n. 173.
452. Cf. *supra*, Nos. 183-186.
453. Cf. P. B. MIGNAULT, *op. cit. supra*, note 397, pp. 148-149.
454. Cf. *Legault v. Schetagne* (1930) 48 B.R. 313; *Acton Vale Silk Mills Ltd. v. Lalancette* (1941) 79 C.S. 226; *Forcier v. Forcier* (1942) C.S. 308.
455. Cf. *supra*, Nos. 196-197.
456. Cf. art. 1425a, para. 1, C.C.
457. Cf. G. BRIERE, *loc. cit. supra*, note 301, p. 34.
458. *An Act respecting matrimonial regimes* (Bill 10, 1969) assented to, p. 21a.
459. Cf. P. B. MIGNAULT, *op. cit. supra*, note 397, p. 169; R. COMTOIS, *op. cit. supra*, note 19, n. 57, p. 86.
460. Cf. R. COMTOIS, *ibidem*.
461. Cf. E. CAPARROS, *loc. cit. supra*, note 204, p. 314.
462. For example, the reference made by Art. 1280, 1, *in fine* to arts. 1282 to 1285, indicating thereby that arts. 1286 to 1288 were re-

pealed; the redundancies contained in these articles might also be mentioned.

- 463. Cf. *An Act to again amend the Civil Code*, S.Q. 1971, c. 85, art. 19.
- 464. Cf. art. 671, *C.C.*
- 465. Cf. art. 1290, para. 2, *C.C.*
- 466. Cf. art. 1291, para. 3, *C.C.*
- 467. Cf. art. 1290, para. 2, *in fine*, *C.C.*
- 468. Cf. art. 1285, para. 3, *in fine*, *C.C.*
- 469. Cf. art. 1294, *C.C.*, according to the 1964 wording and *An Act respecting the legal capacity of married women*, Bill 16, as amended by the Legislative Council on May 14, 1964, Quebec City, Queen's Printer, 1964, art. 13 and p. 2a.
- 470. *An Act respecting matrimonial regimes*, Bill 10, assented to December 12, 1969, Quebec, Editeur Officiel du Québec, 1969, p. 20a.
- 471. Cf. art. 1290, para. 2, *in fine*, *C.C.*
- 472. Cf. art. 1291a, para. 3, *C.C.*
- 473. Cf. *Contra*, J. PINEAU, *op. cit. supra*, note 37, p. 110.
- 474. Cf. POTHIER, *op. cit. supra*, note 404, n. 255, pp. 162-163.
- 475. Cf. P. B. MIGNAULT, *op. cit. supra*, note 397, p. 170.
- 476. Cf. art. 1266i, *C.C.*
- 477. Cf. art. 1279a, *C.C.*
- 478. Cf. art. 1267a, para. 3, *C.C.*
- 479. Cf. J. PINEAU, *op. cit. supra*, note 37, p. 107.
- 480. In spite of reforms, the Code still maintains obsolete terminology here. The expression "dette passive" ("debt") is found in Pothier contrasted with "dette active" or "créance" (claims) (cf. POTHIER *op. cit. supra*, note 404, n. 239, p. 155, where he uses both expressions, and see also n. 77, pp. 82-83, to which he refers and where he speaks only of "créances"). For greater clarity, the Code should refer here simply to "dettes" ("debts").
- 481. Cf. arts. 468 and 469, *C.C.*
- 482. See our interpretation of art. 1297, *supra*, n. 212.
- 483. Cf. *supra*, n. 218.
- 484. Although the cases do not deal with the question specifically, cf. *Bundock v. Potvin* (1940) 78 C.S. 238, and *Lizotte v. Tourigny* (1963) C.S. 488.
- 485. J. RENAULD, *op. cit. supra*, note 1, n. 922, p. 584.
- 486. For a study of this evolution, see E. CAPARROS, *op. cit. supra*, note 2, Nos. 201-223 and *Passim*.
- 487. Cf. E. CAPARROS, *loc. cit. supra*, note 204, p. 311.
- 488. Cf. *supra*, n. 108.
- 489. Cf. *supra*, n. 109 and references.
- 490. Cf. *supra*, n. 111.
- 491. Cf. *supra*, n. 108.

492. Comp. art. 1292, para. 1, C.C. with art. 1425, para. 1, *in fine*; art. 1292, paras. 2 and 3 with art. 1425a, para. 2 and art. 1292, para. 4 with art. 1425a, para. 5.
493. Comp. arts. 1292 and 1425a. C.C. according to the 1964 wording.
494. Cf. art. 1272, 3, C.C.
495. Cf. *supra*, n. 246.
496. Cf. art. 1298, C.C. before 1964.
497. Cf. art. 1297, C.C. 1964 wording.
498. Cf. art. 1298, C.C., 1964 wording.
499. Cf. art. 1297, C.C.
500. Cf. art. 1292, C.C.
501. Cf. *supra*, n. 212.
502. Cf. *supra*, Nos. 126-134.
503. Cf. art. 1441 C.C.; we shall examine the provisions of this article in the section dealing with separation of property.
504. Cf. P. B. MIGNAULT, *op. cit. supra*, note 397, pp. 304-305.
505. For example, cf. *Rousseau v. Laporte* (1950) C.S. 499.
506. This provision is also applied by our courts in cases of separation from bed and board; see *Bell v. Johnson* (1923) 34 B.R. 507, aff. by the Supreme Court on April 25, 1923.
507. Cf. *Downing v. Markwell* (1929) 67 C.S. 56; *Therrien v. Sabourin* (1942) C.S. 205.
508. Cf. *supra*, n. 254.
509. Cf. art. 1266u, C.C.
510. Cf. art. 1266v, para. 2, C.C.
511. Cf. *supra*, Nos. 139-141.
512. Cf. A. MAYRAND, *op. cit. supra*, note 377, n. 160, pp. 137-138; G. BRIERE, *op. cit. supra*, note 381, p. 33.
513. Cf. A. MAYRAND, *op. cit. supra*, note 377, n. 161, pp. 138-139; G. BRIERE, *op. cit. supra*, note 381, p. 33.
514. Cf. *Gagné v. Martineau* (1958) C.S. 512.
515. Cf. *Hickman v. Legault* (1961) C.S. 192.
516. Cf. *Bélanger v. Guaranty Trust Co. of Canada* (1959) R. P.373.
517. See *Traité de droit civil du Québec*, Vol. 4, by L. FARIBAULT, Montreal, Wilson & Lafleur, 1954, pp. 197 and 198.
518. Cf. H. TURGEON, *La succession légitime de la province du Québec*, Montreal, Imprimerie Saint-Joseph, 1959, n. 52, p. 123; A. MAYRAND, *op. cit. supra*, note 377, n. 154, pp. 127-128; G. BRIERE, *op. cit. supra*, note 381, p. 32.
519. Cf. J. RENAULT, *op. cit. supra*, note 1, n. 1252, pp. 734-735.
520. Cf. POTHIER, *op. cit. supra*, note 404, n. 585, pp. 308-309, on the basis of art. 232 of the *Nouvelle Coutume de Paris*; P. B. MI-

- GNAULT, *op. cit. supra*, note 397, p. 242, on the basis of the former art. 1265 of the *Civil Code*.
521. Cf. art. 1265, C.C. and *An Act respecting matrimonial regimes*, Bill 10, 1969, assented to, pp. 6a and 7a.
 522. Cf. J. RENAULD, *op. cit. supra*, note 1, n. 1251, p. 734 and references.
 523. Cf. art. 1265, C.C.
 524. In this respect, cf. J. RENAULD, *op. cit. supra*, note 1, n. 1252, pp. 734-735 and note 16.
 525. Cf. *supra*, n. 256.
 526. Cf. art. 1381, 1 and 2, C.C.
 527. Cf. art. 1381, 1 and 2, C.C., before the 1969 reform.
 528. Cf. *supra*, n. 212.
 529. Cf. arts. 1277-1279, C.C.
 530. Cf. arts. 1284 and 1285, C.C.
 531. See also art. 1303, C.C. which lays down the same principle and provides examples.
 532. Cf. art. 1277, C.C.
 533. Cf. art. 1278, C.C.
 534. Cf. P. B. MIGNAULT, *op. cit. supra*, note 397, pp. 242-243.
 535. Cf. *supra*, Nos. 150-151.
 536. Cf. *Ibidem*.
 537. Cf. art. 1357, 3, C.C.
 538. Cf. art. 1358 and *supra*, n. 268.
 539. Cf. R. COMTOIS, *op. cit. supra*, note 19, n. 156a, p. 170.
 540. Cf. P.B. MIGNAULT, *op. cit. supra*, note 397, p. 318.
 541. Cf. R. COMTOIS, *op. cit. supra*, note 19, n. 156b, pp. 170-171.
 542. Cf. *ID*, n. 157, p. 171.
 543. Cf. P. B. MIGNAULT, *op. cit. supra*, note 397, p. 318; R. COMTOIS, *op. cit. supra*, note 19, n. 157, p. 171; J. PINEAU, *op. cit. supra*, note 37, p. 126.
 544. Cf. art. 1359, para. 2, C.C.
 545. Cf. R. COMTOIS, *op. cit. supra*, note 19, n. 158, pp. 171-172.
 546. Cf. *Bell v. Johnson* (1923) 34 B.R. 507, aff. by the Supreme Court on April 25, 1923.
 547. Cf. POTHIER, *op. cit. supra*, note 404, n. 688, pp. 349-350.
 548. Cf. *ID*, p. 350.
 549. In this respect, cf. P. B. MIGNAULT, *op. cit. supra*, note 397, pp. 325-327; J. PINEAU, *op. cit. supra*, note 37, p. 129.
 550. Cf. P. B. MIGNAULT, *op. cit. supra*, note 397, p. 326.
 551. Cf. art. 1360, C.C.
 552. Cf. art. 1425f, para. 2, C.C.

553. Separation of property was regulated by arts. 1422-155 of the *Civil Code*. Since the last reform, the Code has a specific chapter on separation: Book III, Title IV, Chapter IV.
554. Cf. Book III, Title IV, Chapter II, Section II.
555. Cf. art. 1384, n. 1, 1a, 2 and 7, *C.C.*
556. Cf. art. 1384, n. 3, *C.C.*
557. Cf. art. 1384, n. 4, 5 and 6, *C.C.*
558. Cf. POTHIER, *op. cit. supra*, note 404, n. 315, pp. 187-188.
559. Cf. COMMISSION ON THE CIVIL RIGHTS OF WOMEN, Second Report, *cit. supra*, note 218, pp. 10-17.
560. Cf. POTHIER, *op. cit. supra*, note 404, n. 303, p. 181.
561. Cf. art. 1391, *C.C.*
562. Cf. art. 1392, *C.C.*
563. Cf. art. 1396, *C.C.*
564. Cf. art. 1397, *C.C.*
565. Cf. art. 1399, *C.C.*
566. Cf. art. 1407, para. 1, *C.C.*
567. Cf. art. 1407, para. 2, *C.C.*
568. Cf. art. 1410, para. 2, *C.C.*
569. Cf. art. 1411, para. 2, *C.C.*
570. Cf. arts. 1403 and 1404, *C.C.*
571. Cf. art. 1401, para. 1, *C.C.*
572. Cf. art. 1401, para. 1, *in fine*, *C.C.*
573. Cf. art. 1401, para. 2, *C.C.*
574. Cf. art. 1402, *C.C.*
575. Cf. Chapter IV, of title IV, of book III, *C.C.*
576. Cf. old articles 1311-1322, *C.C.*, which used to regulate the judicial separation of property.
577. Cf. old articles 1422-1425, *C.C.*, which used to regulate the "Separation of property clause" among the conventional modifications to the community.
578. Cf. E. CAPARROS, *loc. cit. supra*, note 204, pp. 316-317.
579. Cf. E. CAPARROS, *Les incidences du Bill 16 sur les régimes matrimoniaux* (Memoire for the D.S.S.L.), Quebec, typewritten, 1965, pp. 128-144.
580. Cf. *supra*, n. 57.
581. Cf. art. 1436, *C.C.*
582. Cf. art 1264, *C.C.*
583. Cf. J. C. RENAULD, *op. cit. supra*, note 1, Nos. 1582 to 1589, pp. 892-896.
584. Cf. *op. cit. supra*, note 397, p. 397.
585. Cf. *Traité de droit civil du Québec*, Vol. 10 by L. FARIBAULT, Montreal, Wilson & Lafleur, 1942, p. 426.

586. J. G. RENAULD, *op. cit. supra*, note 1, n. 1650, p. 927; see also G. BRIERE, *loc. cit. supra*, note 5, p. 466.
587. Cf. art. 165, C.C.
588. Cf. *supra*, Nos. 37 and 116-119 and references.
589. For a very complete study of jurisprudence in this area, cf. G. BRIERE, *loc. cit. supra*, note 5, pp. 470-473.
590. *Id.*, p. 473.
591. *Hudon v. Marceau*, (1878) 23 L.C.J. 47, at pp. 48-49 (the underlining is ours).
592. Cf. *Paquette* (also *sub nomine: Pacquet*) v. *Guertin*, (1879) 2 L.N. 211 (C.A.); *Garrigan v. Garrigan*, (1878) 9 R.L. 510 (C. rev.) (the credit appears to have been given to the wife); *Bachlaw v. Cooper*, (1880) 3 L.N. 128 (C. cir.); *Bruneau v. Barnes*, (1881) 25 L.C.J. 245 (C.A. 1880); *Lefavre v. Guay*, (1883) 3 D.C.A. 255 (C.A.); *Griffin v. Merrill*, (1887) 15 R.L. 55 (C.A.) (the credit had been given to the wife); *Harwood v. Fowler*, (1889) 34 L.C.J. 209 (C. rev.) (in spite of the husband's insolvency, he is held responsible because the credit had been given to him); *Stuart v. Barré*, (1889) 12 L.N. 203 (C. mag.); *Stuart v. Dussault*, (1889) 12 L.N. 276 (C. mag.); *Hamilton v. Lafrenière*, (1891) 20 R.L. 521 (C.S. Mtl.) (the credit had been given to the wife); *Pontbriand v. Mazurette*, (1898) 5 R. de J. 125 (C. cir.); *Gregory v. Odell*, (1911) 39 C.S. 291 (C. rev.); *Gloutnay v. Davignon*, (1911) 40 C.S. 228 (C. rev.) (the husband is held responsible, on the basis of the credit, in spite of his insolvency); *Boland v. Skead*, (1915) 48 C.S. 244 (C. rev.) (the credit had been given to the wife); *Johnson v. Hudon*, (1919) R.L. n.s. 171 (C. rev.) (the criterion is not clear in this judgment); *Merchants Coal Supply Co. v. Ellison* (1933) 71 C.S. 486 (C. cir. Mtl.) (this judgment makes a very complete examination of the question on the basis of contractual liability); *Champagne v. Gougeon*, (1939) 77 C.S. 76; *Religieuses hospitalières de St-Joseph de l'Hôtel-Dieu d'Arthabaska v. Couture*, (1947) C.S. 297; *C.P.R. v. Kelly*, (1952) 1 R.C.S. 521 (although there were many important legal aspects to this judgment, Justice Taschereau quotes and approves *Hudon v. Marceau*, on page 535, *Bruneau v. Barnes*, on page 539 and *Gregory v. Odell*, on page 534); *Roger v. Desfossés*, (1970) R.L. 247 (C. prov.).
593. G. BRIERE, *loc. cit. supra*, note 5, p. 476.
594. Cf. art. 1538, para. 3, *Fr. C.C.*
595. See, on this subject, R. COMTOIS, *Essai sur les donations par contrat de mariage*, Montreal, Le recueil de droit et de jurisprudence, 1968; *ID.*, "Des donations par contrat de mariage", (1972-73) 75 *R. du N.* 253-261; see also, G. BRIERE, *Les libéralités*, 4th ed., Montreal, Cours de Thémis, 1972, pp. 205-226; A. BOHEMIER, "Des donations consenties par contrat de mariage et la maxime 'Donner et retenir ne vaut'", (1964-65) 67 *R. du N.* 229-245 and 285-298.
596. Cf. old articles 770 and 1265, para. 2, C.C.

597. Cf. art. 1257, *C.C.*
598. Cf. V. NABHAN, "Incidences du Bill 10 sur le droit des donations", (1970) 11 *C. de D.* 321-329.
599. In this respect, cf. *Id.* 322-323 and references.
600. Cf. art. 1265, *C.C.*
601. We will not examine this question, but see: A. COSSETTE, "La loi concernant les régimes matrimoniaux et l'irrévocabilité de l'institution contractuelle", (1971-1972) 74 *R. du N.* 28-33 and references; R. COMTOIS, "Changement de régime matrimonial—Donation mutuelle entre époux par contrat de mariage", (1971-1972) 74 *R. du N.* 34-37 and *Id.*, *loc. cit. supra*, note 595, 260-261.
602. Cf. art. 208, *C.C.*
603. Cf. art. 778, para. 1, *C.C.*
604. Cf. art. 778, para. 2, *C.C.*
605. Cf. art. 777, para. 1, *C.C.*
606. Cf. G. BRIERE, *op. cit. supra*, note 595, p. 211.
607. Cf. art. 757, *C.C.*
608. Among the many judgments in this area, one may consult, for example, those that have considered that the gift was *inter vivos* and exigible during the donor's lifetime, in accordance with the terms of the contract: see: *Viger v. Kent*, (1888) 16 R.L. 565 (C.S.); *Morin v. Bédard*, (1889) 17 Q.L.R. 30 (C.S.); *Feneglio v. Ouellet*, (1905) 11 R de J. 303 (C.S.); *Fox v. Lamarche*, (1907) 16 B.R. 83; *Noel v. Gourdeau*, (1911) 17 R.L. n.s. 103 (C. cir.); *Lusher v. Decary*, (1911) 39 C.S. 469 (C. rev.); *Banque de Montréal v. Roy*, (1917) 26 B.R. 549; *Paquette v. Desjardins*, (1920) 57 C.S. 232 (C. rev.); *Kern v. Smart*, (1921) 59 C.S. 524 (C. rev.); *In re Cameron*, (1923) 3 C.B.R. 771; *Cantin v. Dubuc* (1923) 61 C.S. 180; *Laberge v. Savaria*, (1923) 61 C.S. 128; *Villandre v. Bélanger*, (1925) 63 C.S. 40; *Bennette v. Cameron*, (1926) 66 C.S. 5; *Garneau v. Gratton*, (1931) 69 C.S. 3; *Roy v. Lepage*, (1935) 73 C.S. 515; *Matte v. Galibois* (1938) 45 R.L. n.s. 351, (1939) 46 R.L. n.s. 174; *Filion v. Perras*, (1944) B.R. 294, 25 C.B.R. 147; *Traham v. Roberge*, (1947) C.S. 269; *Bacque v. Leclerc*, (1953) R.L. 17 (C. mag.); *G. B. Ciot Cie. v. Bowes*, (1961) C.S. 518; *Tremblay v. Gauthier*, (1964) R.P. 241 (C. mag.); *P. v. D.* (1971) R.P. 11 (C.S.).
609. According to the amendment of the *Act to amend the Civil Code*, Q.L. 1969, c. 74, art. 12.
610. Art. 208, para. 2, *C.C.* (the underlining is ours).
611. For a study of these questions, cf. A. MAYRAND, *loc. cit. supra*, note 336, pp. 154-158.
612. Cf. art. 1149, para. 2, *C.C.*
613. Cf. A. MAYRAND, *loc. cit. supra*, note 336, p. 154.
614. In this respect, cf. *Id.*, p. 155.
615. Art. 208, para. 3, *C.C.*
616. *Ibidem*,

617. Cf. *Theberge v. Delisle*, (1972) C.S. 768.
618. Cf. *P. v. S.*, (1952) R.P. 116 (C.S. Chicoutimi), judgment under old article 208; see also *Martineau v. Martineau*, (1973) C.S. 562, under new article 298, C.C.
619. For a study of this question, cf. R. COMTOIS, *loc. cit. supra*, note 595, pp. 255-258.
620. Cf. *Gagnon v. Noël*, (1970 C.A. 852, although the compilation only publishes the summary of the judgment.
621. Cf. *Klemka v. Klemka*, (1971) C.S. 18; *P. v. D.*, (1971) R.P. 11 (C.S. Mtl.); *In re McCarthy*, (1971) 16 D.L.R. (3d) 72 (P.C., N.S.); *Brunette v. Audet*, (1971) C.A. 342; *Moreau v. Lessard*, C.S. Abitibi, Nos. 14630 and 15351, Feb. 12, 1972, J. H. Drouin, partly reproduced in (1971-72) 74 R. du N. 540; *Labrie v. Gilbert*, (1973) C.S. 134.
622. Cf. *Jacobs v. Goldberg*, (1971) C.A. 800.
623. Cf. R. COMTOIS, *op. cit. supra*, note 595, p. 97; G. BRIERE, *op. cit. supra*, note 595, p. 215.
624. For example, cf.: *Symons v. Kelly* (1877) 21 L.C.J. 251 (C.S.); *Workman v. Mulholland*, (1879) 23 L.C.J. 324 (B.R.), 10 R.L. 42, 2 L.N. 82; *Boissy v. Daignault*, (1896) 10 C.S. 33 (C. rev.), inf. (1895) 8 C.S. 409; *Demers v. Blacklock*, (1897) 12 C.S. 43 (C. rev.); *Newman v. Despocas*, (1900) 17 C.S. 477; *Pagé v. Beauchamp*, (1901) 20 C.S. 220; *Goyette v. Leclerc*, (1903) 23 C.S. 524 (C. rev.); *Dorval v. Préfontaine*, (1905) 14 B.R. 80; *Proulx v. Klineberg*, (1906) 30 C.S. 1; *Von Eberts v. Allan*, (1910) 16 R.L. n.s. 308 (C.S.); *Houde v. Marchand*, (1912) 21 B.R. 184; *Plamondon v. Larue*, (1913) 43 C.S. 18; *Martel v. Vignault*, (1913) 44 C.S. 542 (C. rev.); *Marceau v. Tassé*, (1918) 53 C.S. 425; *Bergeron v. Bonhomme*, (1924) 62 C.S. 515; *Lemieux v. Lindsay Ltée*, (1926) 41 B.R. 18, inf. *Lemieux v. Cusack*, (1926) 64 C.S. 203; *Communauté des Soeurs de Ste-Anne v. Leroux*, (1929) 67 C.S. 475; *Dorion v. Deslauriers*, (1933) 71 C.S. 145 (C. mag.); *Demers v. Demers*, (1934) 72 C.S. 48; *Grégoire v. Laliberté*, (1935) 41 R.L. n.s. 243 (C.S.); *Laberge v. Garnier*, (1937) 43 R.L. n.s. 260 (C. cir.); *Cie Mongeau et Robert Ltée v. Deserres*, (1940) 78 C.S. 298; *Archambault v. Gariépy*, (1942) C.S. 428; *Charron v. Lemaire*, (1952) C.S. 375; *Caisse Populaire de N.-D.-de-Lorette v. Dufour*, (1964) R.P. 179 (C. mag.); *Lerner v. Blackburn*, (1971) C.S. 385.
625. For example, cf. *Marceau v. Tassé*, (1918) 53 C.S. 425 and *Bergeron v. Bonhomme*, (1924) 62 C.S. 515.
626. For example, cf. *Communauté des Sœurs de Ste-Anne v. Leroux*, (1929) 67 C.S. 475; *Dorion v. Deslauriers*, (1933) 71 C.S. 145 (C. mag.); *Grégoire v. Laliberté*, (1935) 41 R.L. n.s. 243 (C.S.)
627. For example, cf. *Symons v. Kelly*, (1877) 21 L.C.J. 251 (C.S.) and *Lerner v. Blackburn*, (1971) C.S. 385.
628. Cf. arts. 804-810, C.C.
629. Cf. arts. 806 and 807, para. 2, C.C.

630. Cf. art. 807, para. 1, *C.C.*
631. Cf. art. 808, *C.C.*
632. As an example only, cf.: R. COMTOIS, *op. cit. supra*, note 595, pp. 159-193 and references; J. G. CARDINAL, "Défaut d'enregistrement des donations par contrat de mariage", (1955-56) 58 *R. du N.* 89-99 and references; G. BRIERE, "L'art de ressusciter l'institution contractuelle non enregistrée au vivant du donateur", (1968-69) 71 *R. du N.* 238-249 and references. With respect to the effect of the *Act respecting the central register of matrimonial regimes*, Q.L. 1969 c. 78 on the registration of gifts, see G. BRIERE, *loc. cit. supra*; note 149.
633. As an example only, cf.: *Marchessault v. Durand*, (1889) M.L.R. 5 Q.B. 364; *Pelletier v. Lapalme*, (1897) 12 C.S. 97 (C. rev.); *Denis v. Kent*, (1900) 18 C.S. 436; *Huot v. Bienvenu*, (1903) 33 R.C.S. 370 conf. (1903) 12 B.R. 44 and (1902) 21 C.S. 341; *Demers v. Raby*, (1920) 26 R.L. n.s. 66 (C. rev.); *Villeneuve v. Union Mutual Life Ins. Co.*, (1920) 58 C.S. 272; *Young v. Côté*, (1922) 33 B.R. 55; *Sabourin v. Périard*, (1947) B.R. 34; *St-Martin v. Héritiers d'Aoust*, (1964) C.S. 21, *Re Sanscartier*, (1968) R.P. 423 (C.S. Trois-Rivières); *Lavallé v. Thibault*, (1968) B.R. 473.
634. Cf. *supra*, note 609.
635. Cf. *Maloney v. Rassie*, (1961) R.L. 169 (C.S. Mtl. Jan. 26, 1951); *B. v. S.* (1960) R.L. 444 (C.S. Mtl.).
636. Cf. *Dussault v. Clark*, (1955) C.S. 325; *Tollet Power-Williams v. Power-Williams*, (1960) B.R. 800. And see, with respect to this question generally, before the amendment to article 208, *C.C.* A. MAYRAND, "Effets du divorce sur les donations entre époux par contrat de mariage", (1961-62) 64 *R. du N.* 85-90 and references.
637. Art. 208, para. 3, *C.C.*
638. We have already examined the question of the competence of the Superior Court, Divorce Division, with respect to the partition of property or gifts, see *supra*, n. 131 and references.
639. Cf. *supra*, n. 330.
640. Cf. art. 1440, *C.C.* and *supra*, n. 134.
641. Cf. art. 1441, *C.C.*
642. Art. 1440, *in fine*, *C.C.*
643. Cf. *supra*, n. 134.
644. We have already pointed out that the husband cannot request the judicial separation of property under the community, see *supra*, Nos. 252 and 334.
645. Art. 1441, *C.C.*
646. Cf. art. 1280, para. 5, *C.C.*
647. Cf. *Mondor v. Hervieux*, (1923) 35 B.R. 59.
648. Cf. *Bolduc v. Bouchard*, (1911) 21 B.R. 6.

649. Cf. *Levesque v. Fournier*, (1945) C.S. 390; *Guay v. Leroux*, (1947) C.S. 214.
650. Cf. *Breton v. Roy*, (1958) C.S. 632.
651. Sec. 815, *C.C.P.*, amended by the *Act to amend the Code of Civil Procedure*, Q.L. 1969, c. 81, art. 21.
652. Sec. 814, para. 1, *C.C.P.*, amended by *id.*, art. 20.
653. For an example of judicial separation of property for this purpose, cf. *Lebeau v. Grobstein*, (1960) B.R. 1030.
654. Art. 1445, para. 1, *C.C.*
655. Cf. J. RENAULT, *op. cit. supra*, note 1, n. 1074, pp. 649-650 and n. 1076, p. 651; P. B. MIGNAULT, *op. cit. supra*, note 397, p. 277.
656. Cf. art. 1445, para. 2, *C.C.*
657. Cf. P. B. MIGNAULT, *op. cit. supra*, note 397, p. 258.
658. Cf. art. 1267d, para. 2, *C.C.* for the partnership of acquests.
659. Cf. art. 1446, *in fine*, *C.C.*
660. Cf. art. 1266, para. 2, *C.C.*
661. Cf. sec. 818, *C.C.P.* and compare with art. 1266, para. 2, *C.C.*
662. For example, cf. *Lebeau v. Grobstein*, (1960) B.R. 1030.
663. Cf. art. 1266v, para. 2, *C.C.* for the partnership of acquests and art. 1351, *C.C.* for the community of property.
664. Cf. art. 1313, *C.C.* before repeal by an *Act to amend the Civil Code and the Code of Civil Procedure respecting the civil rights of women*, S.Q. 1930-31, c. 101, art. 20.
665. Cf. *Id.*, art. 31.
666. Cf. COMMISSION ON THE CIVIL RIGHTS OF WOMEN, *Second Report*, Quebec City, 2nd ed. 1930, p. 28.
667. *Code of Civil Procedure*, S.Q. 7965, 1st Session, c. 80, sec. 22.
668. Cf. *An Act to again amend the Code of Civil Procedure*, Q.L. 1969, c. 81, art. 22.
669. This sec. 816, *C.C.P.* should also have been amended in order to agree with the new situation under the partnership of acquests.
670. Cf. art. 1442, *in fine*, *C.C.*
671. Cf. *Lebeau v. Grobstein*, (1960) B.R. 1030, J. RINFRET, on page 1037 and see also J. BISSONNETTE, pp. 1040-1041.
672. J. RINFRET, *Ibidem*, (the underlining is ours).
673. *Ibidem*.

Family Property Law: Proposals for Reform

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The authors wish to acknowledge the very considerable contribution made to this paper by Professor Richard W. Bartke of Wayne State University in Detroit. Professor Bartke is largely responsible for that section of the paper which deals with community property regimes in the United States. Without his initiative and guidance, it would have been impossible to summarize the existing regimes in the United States with any degree of confidence or accuracy.

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Introduction

When a marriage ends, particularly by divorce, there is often a dispute between husband and wife over the ownership of the property. If they, or their lawyers, are unable to reach an agreement concerning a division of the property, one of them may commence a law suit in order to determine the respective ownership interests of each party. How the courts decide such cases in turn influences the agreements other couples may make in regard to their property. The primary purpose of this paper is to consider whether the present law in regard to the division of property between husbands and wives is just and equitable, and, if not, to propose alternative approaches. We will briefly examine the present law concerning the division of property between spouses and indicate some of the problem areas under the present law. Several possible alternative approaches will then be examined. These alternative approaches will be discussed without regard to possible constitutional implications although it is recognized that such implications may play a part in the selection of which alternative(s), if any, may be adopted. It is to be noted that the provinces presently occupy the field in regard to legislation affecting property. Finally, some provisional views as to the possible alternatives will be expressed.

There are two general approaches to the division of property between spouses in operation in Canada. Quebec has a type of "community property" whereas the other provinces and territories have a "separate property" approach. Under the Quebec regime, couples may opt for separate property, and, to the extent that they make such an election, their law and its problems are similar to those of the separate property provinces. A detailed review of the property regimes in Quebec appears in the preceding study paper. Accordingly, our examination of the existing law regulating property rights between family members will concentrate on the doctrine of separate property prevailing in the common law provinces.

Separate Property

Background

A brief background to the separate property system may assist in the understanding of some of its basic features. Until the 1880's, a married woman in England lacked the legal capacity to own and control either real or personal property in her own name. In general terms, upon marriage the husband acquired his wife's personal property and almost completely controlled her real property. With accuracy it was observed that under the common law, "upon marriage the husband and wife are one and the husband is the one". Although the English courts, applying principles of equity, made some attempt to remedy the resulting injustice, it was not until Parliament enacted the *Married Women's Property Act 1882* that any fundamental change was made. By that Act a wife was given the capacity to acquire and dispose of real or personal property. Each of the spouses was thus free to acquire and control separate property and this feature is still the cornerstone of the property regime in the common law provinces. All of the common law provinces have legislation that is similar to the English Act of 1882. This legislation equalizes the spouses' capacity to own property but does not direct how property is to be divided on marriage breakdown. The question may quite properly be raised as to whether this legislation goes far enough to recognize the needs and expectations of today's society having regard to the economic re-adjustments which may or should be made when a marriage ends.

Basic rules of separate property

Although since 1882 married women have had the capacity to own property, it has been left to the courts to determine whether specific assets are owned by the husband, the wife, or by both. The courts have decided many

cases and on the basis of these cases some general features of the present law governing disputes over property between spouses may be summarized.

Under the present law in the common law provinces the judicial focus in inter-spousal disputes over property is upon “ownership”. If the husband is held to “own” the asset it is his; if the wife is held to “own” the asset it is hers; if they are both “owners” the property or its value is theirs and is divided between them. Ownership, in turn, is based upon a few legal principles which, with a few possible exceptions, apply both to real property (the home, farm, real estate, resort property, etc.) and to personal property (the household effects, vehicles, boats, works of art, stocks and bonds, bank and savings accounts, etc.). Subject to two exceptions, ownership is basically determined by who paid for the asset—“it is mine if I paid for it with my own money.” The first exception is that spouses may have had an agreement between themselves respecting ownership of property. These agreements may provide, for example, that regardless of which spouse pays for or holds the title to property, both of them are entitled to a half interest in the property. Such agreements may be drawn either before or after the marriage. Most married couples do not have such agreements and the courts have to decide where ownership lies apart from such an agreement. The second exception relates to the way title to the property may have been taken. If a husband pays for property with his own money but takes title in his wife’s name (or in their joint names), the courts rely upon a rebuttable presumption to the effect that he intended to give his wife a gift of the full ownership interest (or a half interest if title was taken in joint names). For example, if a husband buys a house with his own money but has the title taken in his wife’s name, she will usually be held to be the owner of the house. The husband may rebut this presumption by showing that he did not intend to make a gift to his wife at the time of the purchase or by showing that he put the property in his wife’s name for some other reason. This presumption does not apply, however, where it is the wife who purchases property with her own money and takes title in her husband’s name. In that factual situation the courts generally have held that the husband is holding the legal title for his wife and that the property belongs to her.

At first blush these rather basic legal principles may not seem to operate unfairly in that each spouse is entitled to own property in his or her own name, and, at least in some limited respects the wife may be in a favoured position in the factual situation where she buys property with her money but takes title in her husband’s name. However, upon closer analysis, the present law has several rather serious problems.

Problems with the separate property approach

1. The “mine if I paid for it with my own money” approach is unfair because it does not allow recognition of the married woman’s contribution

as a homemaker. The wife who remains in the home to rear the children or to maintain the home often has little or no opportunity to earn outside income which might be used to purchase separate property. Under the present law she is not entitled to any share of the property held by her husband in his name if he has paid for it with his own money. Even where the wife has held a job after marriage, she often interrupts her employment for a time in order to bear and rear children and this, in turn, reduces her opportunity to contribute directly towards the purchase price of assets. In either of these situations the wife's role as a homemaker almost invariably frees the husband from many of these responsibilities and thereby enables him to earn money to acquire more assets. So long as property disputes between spouses are resolved on the basis of direct financial contribution toward the purchase price, the wife who stays in the home on either a full or part-time basis will be short-changed because her role as a homemaker has deprived her of the opportunity to earn money and to contribute directly toward the purchase of property. Under the present law the wife's contribution as a homemaker goes unrecognized in the determination of ownership of the property. Her legal capacity to own property in her own right is of no practical significance unless she has been able to directly contribute her own money toward the purchase of assets. This basic unfairness of the present law has been aptly capsulized in the following manner: "The cock bird can feather his nest precisely because he does not have to spend most of his time sitting on it."

No Canadian case has given any wife a share of the home, its contents, or a share in any other property merely because of her role as a homemaker. The courts have traced ownership to the person who paid for the asset. The hardship and unfairness of this approach can be illustrated by many cases. For example, in a recent case the husband sought to obtain all of the furniture and other items which he had left behind when he had departed from the home over three years earlier. His action was based on the argument that all these assets belonged to him and that his ex-wife had no right to any share of them. The evidence indicated that the wife had not brought any money or assets into the marriage and that she had not worked outside the home during the years of their marriage. The assets had been paid for by the husband out of his income. The court held that the husband was entitled to all of the furniture and other items. In his written judgment the trial judge relied upon the following passage from a landmark decision in the Supreme Court of Canada which was reported in 1961:

But no case has yet held that, in the absence of some financial contribution, the wife is entitled to a proprietary (ownership) interest from the mere fact of marriage cohabitation and the fact the property in question is the matrimonial home.

Perhaps sensing the unfairness of his decision, the trial judge closed his judgment as follows:

This judgment seems oppressive on the wife, but I can see no alternative under existing law. Fortunately, a case such as this is a rare one, because few ex-husbands pursue their domestic rights as savagely and relentlessly as does Mr. H. . . .

2. The “mine if I paid for it with my own money” approach is even more unfair where the wife, in addition to her role as a homemaker, assists her husband in the acquisition of assets by working with him in his business, or on the farm. In neither of these situations have wives generally been given any share of the property. The courts have held that such indirect contribution does not entitle the wife to an interest in the property.

A recent decision of the Supreme Court of Canada illustrates the unfairness of the present law which refuses to give the wife an interest in property held by her husband unless she can prove a direct financial contribution toward the purchase price. In that case factual arguments centred upon the question whether the wife had made any financial contribution to the purchase of a ranch. The majority of the court concluded that any money provided through the wife was by way of loan and did not constitute a contribution to the purchase price such as would give her an interest in the property. The wife left her husband because of his cruel conduct and he remained in possession of the ranch and all other property acquired during their marriage. In proceedings by the wife claiming an interest in the property, she was questioned concerning the work she had performed on the ranch:

QUESTION: Could you tell the court, as briefly as you can, the nature of the work you did?

ANSWER: Haying, raking, swathing, moving, driving trucks and tractors and teams, quietening horses, taking cattle back and forth to the reserve, dehorning, vaccinating, branding, anything that was to be done. I worked outside with him, just as a man would, anything that was to be done.

QUESTION: Was your husband away from these properties?

ANSWER: Yes, for five months every year.

The wife’s lawyer argued not only that the wife had made a direct financial contribution to the acquisition of the property but also that her labour over the years should be considered as a contribution which would give her some interest in the property.

Four of the five judges who heard the appeal in the Supreme Court of Canada agreed that the wife’s claim should be dismissed. The majority agreed with the trial judge that there was no agreement between the parties respecting any of the property and that any money given to the husband by the wife was in the nature of a loan from the wife’s mother. With respect to the contention that the wife’s labour over the years should be regarded as a contribution toward the purchase of assets, the majority agreed with the trial judge’s view that her work “was the work done by any ranch wife” and constituted no basis upon which to establish a legal right to an interest in the property.

The dissenting judge was of the opinion that the wife had in fact made a direct financial contribution that would give her an interest in the property. But more importantly, he concluded that her considerable contribution of labour should itself be treated as equivalent to a direct financial contribution. He stated:

The case is one where the spouses over a period of some fifteen years improved their lot in life through progressively larger acquisitions of ranch property to which the wife contributed necessary labour in seeing that the ranches were productive. There is no reason to treat this contribution as any less significant than a direct financial contribution, which to a much lesser degree she also made.

. . . .
A court with equitable jurisdiction is on solid ground in translating into money's worth a contribution of labour by one spouse to the acquisition of property taken in the name of the other. . . .

Although the dissenting judge was willing to adopt a judicial approach which would allow a division of the property, he suggested that legislative action might be the better way to set out a new approach:

No doubt, legislative action may be the better way to lay down policies and prescribe conditions under which and the extent to which spouses should share in property acquired by either or both during marriage. But the better way is not the only way; and if the exercise of a traditional jurisdiction by the Courts can conduce to equitable sharing, it should not be withheld merely because difficulties in particular cases and the making of distinctions may result in a slower and perhaps more painful evolution of principle.

It is difficult to disagree with the opinion that legislative action may be the better way to define matrimonial property rights. In any event, it seems desirable to explore possible legislative solutions.

3. Even where the wife has made a financial contribution to the family finances by working outside the home, the current law leaves much to be desired:

- the law governing property disputes between spouses is complex and difficult for the average person to understand
- spouses often have little or no knowledge about the law and sometimes have positive misconceptions about their rights
- the present law focuses upon factors which spouses may not have regarded as being significant, e.g., whose money was actually used to pay for the asset, in whose name the asset was purchased
- proof of the relevant facts upon which the law tends to focus may be difficult, if not impossible, to establish by reason of the passage of time and the absence of adequate records and accounts
- the law itself is not clear or certain in some factual situations and this creates confusion and uncertainty both in cases which go to court as well as in cases where the parties are seeking to work out a property division by agreement

The above criticisms are primarily levelled at the situation where the wife may acquire an interest in property by reason of her own financial contribution to the acquisition of the property; however, some of them can also be levelled against this whole area of the law.

In support of the above criticisms, a series of examples are listed below. Most of these examples are based on actual cases in which property was

acquired after the marriage in the absence of any agreement between the spouses as to ownership.

Example # 1

If the income is all earned by the husband and all payments on the property in question are made by him out of his own money with title taken in his own name, the wife does not obtain a share. In these circumstances, as indicated earlier, under the present law the wife would be denied a share because she had not made a direct financial contribution toward the purchase price.

Example # 2

If the income is all earned by the husband and all payments are made by him out of his earnings, but title is taken in the joint names of the husband and the wife (or in the wife's name only), the courts rely on a rebuttable presumption to the effect that by taking title in joint names (or in the wife's name only) the husband intended to give a gift to her. In many cases this presumption is not rebutted and the wife is held to be entitled to a one-half interest (or the full interest if title has been taken in the wife's name only). It is easier to make this general statement of the law than it is to apply it. It is not easy to predict whether or not the court will find the presumption rebutted. For example, in two Supreme Court of Canada cases the facts were similar in many respects. In each case, the property involved had been purchased by the husband with his own money and title had been placed in the name of the wife at her insistence. Each husband sought to rebut the presumption by showing that he had not intended to make a gift but made the transfer for other reasons. The two cases came to different results because certain other facts differed. In the one case the husband's evidence indicated that his wife had persuaded him to transfer the property into her name because she feared that he might be sued by a certain party who might ultimately reach the property in order to satisfy his judgment. The husband considered her fears to be groundless and the evidence indicated that there was no likelihood that he could have been sued successfully. Upon these facts the Court concluded that the wife could not rely upon the presumption of gift and that the husband was entitled to say that he had been misled by her. He had made the gratuitous transfer at her insistence in order to allay her fears that future creditors might reach the property. In the other case, the husband argued that he had never intended to make a gift to his wife and that he had only made the transfer to her because he felt that she would then stay with him and make a home for him and his son. No other evidence was introduced in regard to his intention at the time of the making of the transfer. The Court held that the husband had not rebutted the presumption and that the home belonged to the wife.

Example # 3

The husband may give his wife weekly or monthly "household expense money" out of his income with which to purchase groceries, clothing and other items. The wife may sometimes save part of that money. If she uses these savings to purchase an asset in her own name the question could arise as to which of the spouses owned the asset. Several Canadian cases have dealt with this question and there appears to be a difference of opinion as to how it should be resolved. Some Canadian cases have suggested, and several older English cases have held, that the money or property still belongs to the husband. The English position was changed by legislation in 1964 and since then money saved or property purchased out of a household allowance is treated as belonging to both spouses in the absence of any agreement to the contrary. Canadian courts, to date, have not articulated a clear and consistent principle and there has been no provincial legislation introduced corresponding to that in England.

Example # 4

Where both spouses are earning money and contribute directly toward the purchase of an asset, the wife usually obtains a share of the asset even though title may have been taken in the husband's name. In such cases the courts rely on a rebuttable presumption of resulting trust which in effect means that although the husband may hold legal title, he holds the property for himself and his wife. Unless the presumption is rebutted, the court will give the wife an interest in the property at least in proportion to her contribution, and, if her contribution cannot be ascertained the courts generally divide the property on a 50/50 basis. The presumption of resulting trust may be rebutted by evidence that the wife intended to make a gift to her husband of the money she paid toward the purchase of the asset but it is, in fact, exceedingly rare for the presumption to be rebutted.

If the facts in the above example were varied slightly, the judicial response is far less certain. If, for instance, the wife's income over the years had been used for household and family expenses while the husband's income had been used for the actual payments on property acquired in his name, the answer is not so clear. Here it may be argued that the wife had not made a direct financial contribution toward the actual purchase price of the property and therefore she is not entitled to a share. On the other side it may be argued that the mere circumstance of whose money was actually used should not control the outcome. Neither Canadian nor English cases give a clear answer to the issue raised.

To vary the example further, if the spouses have pooled their earnings in a joint bank account and one of them has purchased an asset in his or her own name from that account, difficult questions arise as to whether the title holder is the owner or whether both parties own the asset. Or, changing these facts slightly, suppose the husband made all the contributions to the account, would this alter the result? It may be argued that by depositing money into a

joint account the presumption of gift arises and unless it is rebutted by evidence showing that the husband did not intend to make a gift, the account is held 50/50 and any assets purchased with the money are also so held. Few Canadian cases on such facts have been decided; these cases tend to focus upon whether the presumption of gift has been rebutted which, in turn, depends upon evidence of the depositor's intention. And the court is forced to look for the "intention" of the spouses at the time of purchase, when parties typically do not consider precise issues of ownership and probably had no clearly defined intention.

Example # 5

If the home has been paid for by the husband and title has been taken in his name, but the wife has made, or paid for, substantial repairs or improvements to the home, the law is fairly clear that the wife does not thereby obtain a share of that property. In a recent trial court case on such facts, the court rejected the wife's claim to any interest in the home, stating:

It is undisputed that the property was purchased solely by the husband and with his moneys. There is no evidence that at any subsequent time the husband ever undertook in any way to transfer any interest to the wife. If the mere fact that some of the wife's money went into the repairs or renovations to the house were sufficient to create a half-interest by way of a trust or otherwise in the property, then in this day and age, where a great many wives have independent incomes, there would be very few homes indeed in which both spouses did not have an equal interest at law.

Had the wife contributed her money toward the purchase of the property itself instead of toward the renovations or improvements, she could have relied upon the presumption of resulting trust and very likely would have acquired an interest in the property. It seems harsh to say that because her money was applied toward improvements instead of the purchase price that she should not obtain an interest in the property. Furthermore, the law in such cases would suggest that she may not even be entitled to repayment of the money she spent, unless there is actual evidence that it was in the nature of a loan.

The examples above, and many other cases, illustrate that the present law in regard to property disputes between spouses is complex, uncertain in many situations, and often focuses upon factors which the spouses would not normally have regarded as being significant at the time of purchase. In addition, proof of many of the relevant factors is difficult because married people generally do not keep records with a view to establishing ownership of a particular asset upon marriage breakdown. Nor do couples usually formulate, much less record, their intentions as they transact business and yet cases often turn on the supposed intention of one or both of the spouses. One English appellate judge succinctly outlined the problem facing the trial judge in regard to the finding of this nebulous intent:

When two people are about to be married and are negotiating for a matrimonial home it does not naturally enter the head of either to enquire carefully, still less to agree what should happen to the house if the

marriage comes to grief. What the judge must try to do in all such cases is, after seeing and hearing the witnesses, to try to conclude what at the time was in the parties' minds and then to make an order which, in the changed conditions, now fairly gives effect in law to what the parties, in the judge's finding, must be taken to have [been] intended at the time of the transaction itself.

On the basis of these kinds of criticisms, even in the case where the wife may have contributed to the family finances, it seems that the present state of the law justifies the examination of possible alternative approaches.

4. The present law in regard to property disputes between spouses very likely does not reflect the attitudes, desires and expectations of a substantial majority of Canadians. Both the factors which the courts consider in such disputes and the actual results of many of the cases seem to be out of step with contemporary views of marriage. There have been numerous articles, reports and studies in recent years which have criticized the current approach and which have urged changes.

A recent Canada-wide Gallup Poll canvassed public opinion on the following question:

Where the man has been the chief wage earner in the family, do you think he should or should not have to share equally with his wife any assets accumulated during their marriage, if the two decide to separate?

1,044 persons were interviewed. The answers listed below are percentages of those interviewed:

Should	63%
Depends on Circumstances	23%
Should Not	10%
Don't Know	4%

It appears from this survey that a very substantial majority favour the sharing of accumulated assets at least under certain circumstances. Only 10% indicated that they did not favour an equal sharing. Answers did not tend to vary greatly from region to region across Canada nor were there great differences between the attitudes of men and women.

A more sophisticated English survey of attitudes toward matrimonial property was conducted in 1970-71 with the results published in 1972. English law as it stood just prior to that survey was very similar to the law in the common law provinces in regard to property disputes between spouses. The English survey indicated that a very substantial majority of those interviewed favoured the joint ownership of at least some property by the spouses regardless of how title had been taken or who had actually paid for the property. For example, with respect to the matrimonial home and its contents, the question was put:

Some people say that the home and its contents should legally be jointly owned by the husband and wife irrespective of who paid for it. Do you agree or disagree?

Of the 1,877 married couples responding to this question, 91% of the husbands and 94% of the wives agreed with this statement. The views of widowed people were not significantly different: of the 103 widowed men interviewed, 88% agreed and out of 383 widowed women, 92% agreed with it. Among divorced persons the percentage declined slightly. Of 42 divorced men, 67% agreed. Of the 72 divorced women interviewed, 79% agreed. These and other responses justify the conclusion that many people in England, as in Canada, favour the sharing of some assets regardless of who paid for them.

It seems legitimate to conclude, therefore, that the present law gives inadequate effect to the "our property" concept which many couples have at least in regard to some property. In several factual situations, as noted earlier, where a dispute arises, the courts hold that the property belongs exclusively to the spouse who has paid for it and that the other spouse is not entitled to any part of that property. But we believe that most spouses feel that the property, or at least part of it, belongs to both of them. If a husband is asked, "Whose house is this?" or "Whose furniture is this?" he very likely would reply, "It's ours" regardless of how title may have been taken or whose money paid for it. We believe that this hypothetical answer is indicative of how most married people regard such property. But we do not agree with the judicial opinion expressed in a recent Saskatchewan case that this answer reflects only the husband's attempt to keep peace in the family. The husband may not immediately be able to articulate any rationale for his response other than this is how he feels about it. Given time, however, he might suggest that the property is "theirs" because both he and his wife have contributed to it by their joint efforts, although their individual contributions may have been of a quite different character. The husband may have furnished most of the money to purchase the property while his wife has contributed by looking after the house and the family. Alternatively, he might say that their marriage is a partnership which entitles both spouses to share at least certain property. Whatever the rationale, many people hold the view that at least some sharing of at least some property should take place. Given this attitude, it seems that the law does not give adequate recognition to reasonable expectations.

Certain other countries with an approach similar to the present common law approach in Canada have introduced significant legislative changes in recent years. In both New Zealand and England, legislation has been passed which allows the court to exercise a discretion to divide the property between the spouses without being bound or limited by the legal principles previously discussed. The details of these changes will be set out later, but the point is that these countries have changed their law largely because many people were dissatisfied with the older law. The major change was made in New Zealand in 1963. In England, substantial reforms were introduced in 1970; however, the English Law Commission is currently suggesting still further changes. These changes are persuasive precedents justifying an examination

of the desirability of change in Canada and indicate possible avenues for reform if legislative intervention in this area is considered desirable.

During the last several years this field of law has been the object of widespread concern in Canada. Public concern has been expressed in many ways and by various groups. Several provincial law reform commissions have studied or are studying the area. The Report of the Royal Commission on the Status of Women in Canada, in 1970, recommended that legislation should be drafted which would give each spouse an equal share in the assets accumulated during the marriage otherwise than by gift or inheritance. This area of the law has also attracted attention and study by groups concerned with the rights of women. Press comment by way of editorials, articles, and letters has been extensive and, for the most part, quite critical of the present law. It seems fair to conclude that public opinion favours a move away from the present law toward some scheme which would provide for the possible sharing of at least some of the assets.

Summary of the problems under the present law

Listed below in very brief form are the major problems with the present law governing property disputes between spouses:

- it does not afford adequate recognition to the married woman's contribution as a homemaker
- it does not recognize the wife's indirect contribution in the form of work in a family business or on the farm
- even where the wife has made a direct financial contribution toward family finances, the law still has serious shortcomings—it is complex, unfamiliar to many people, and uncertain in many factual situations—it focuses upon factors which the spouses may not have regarded as being significant, e.g., how title was taken, who paid for the asset—proof of the relevant factors under the present law is often extremely difficult because of the passage of time, the inadequacy of records, and the failure of most married couples to express or record their "intention" at the time assets are acquired.
- it does not reflect the expectations of a substantial majority of Canadians.

Possible ameliorating factors

There are various provincial laws conferring rights on wives that tend to mitigate, but not eliminate, the harshness which results from the law governing property disputes between spouses.

Dower and homestead rights, dependants' relief and intestate succession legislation

Most common law provinces have dower or homestead legislation, dependants' relief legislation, and intestate succession legislation whereby wives are given certain rights. We think that this legislation does not obvi-

ate the need for new statutory laws to regulate matrimonial property rights. After making some preliminary observations, we will consider the general nature of the rights given the wife under this legislation. Then we will indicate why we feel that it should not be regarded as a substitute for a just and equitable statutory scheme for the division of matrimonial property.

The legislation under discussion tends to vary slightly from province to province but there is enough similarity to justify generalization. The relevant legislation is not aimed primarily at the division of property between spouses, but is rather an aspect of the maintenance obligations arising out of marriage. If major changes were made in the law governing the division of property between family members, the provincial legislation would need to be re-examined in light of those changes. For example, if the wife were given a share of the property, she might have less need for some of the rights given under the provincial statutes. With these general observations in mind, let us look at some of the wife's rights.

Dower or homestead legislation in most of the common law provinces gives a wife some rights in regard to at least a portion of her husband's real property. She is usually given occupational rights or a life interest in part of her deceased husband's real property and this often specifically includes the family home. In addition, in several provinces her consent is required for the sale of the husband's real property, and, unless she consents, she retains her dower or homestead rights in the property. The provincial statutes do not give the wife any immediate ownership interest in her husband's property. Furthermore, her rights are often conditional upon her conduct during the marriage. The statutory protection is also conditional upon the continuation of the marriage. If there is a divorce, the "wife" loses the rights she otherwise would have had. This factor severely limits the degree to which these acts alleviate the harshness of the law governing property disputes between spouses.

The intestate succession legislation of the various provinces governs the disposition of assets where the owner dies without a valid will. Under this legislation the surviving spouse is entitled to a designated share of the deceased spouse's estate. In many provinces, the surviving wife takes the entire estate if there are no children. Where there are children, the surviving spouse is usually entitled to a certain dollar value of assets and then the balance of the estate is divided between the surviving spouse and the children of the marriage with the exact share in this latter case being determined by the number of children. Thus, if a husband dies without a will, his wife receives a significant part of his estate. But, if there has been a divorce or if the husband has left a valid will, she will not be entitled to benefit under this legislation.

In some instances the husband may have attempted to dispose of his estate by will in such a way as to leave his wife and dependent children without support. In most provinces, if a deceased husband has failed to make adequate financial provision for his surviving dependants, an applica-

tion may be made under the provincial dependants' relief legislation for maintenance out of his estate. The widow's claim, in several provinces, may be denied on the basis of her conduct during the marriage. Where an order is made in her favour, it may have the effect of giving her some claim upon her deceased husband's property. As in the case of the other provincial legislation discussed above, a woman who has been divorced cannot obtain the benefits of this legislation.

In certain cases provincial legislation does provide a measure of relief from the harsh effects of the present law regulating property rights. But we are of the opinion that it is not a satisfactory substitute for a statutory scheme to directly regulate matrimonial property rights. On the whole, it may be said that the provincial legislation is not directed primarily toward a property division during the lifetimes of the spouses and, in any event, is of little or no assistance to the wife whose marriage has been dissolved by divorce. It may best be regarded as an extension of the husband's obligation to maintain his wife, not as a system for promoting the fair resolution of inter-spousal disputes over property.

Maintenance legislation

Although federal and provincial maintenance orders in favour of wives often tend to mitigate the harshness of the present law governing property interests between spouses, we think that maintenance, at least as it now exists, is an inadequate substitute for satisfactory rules for the sharing of property. In the paragraphs below we will make some general comments on the law of maintenance and give our reasons for rejecting the use of maintenance orders as a method of effecting property divisions.

Despite several differences between federal and provincial maintenance legislation, both have rather serious limitations when considered as a method by which to achieve a fair distribution of property. The basic question asked by the courts under all maintenance legislation differs substantially from the question which should be asked with respect to a possible property division. Regarding maintenance for the wife, the question may be stated:

In light of the conduct of the parties, their means and other circumstances, how much does the wife need and how much can the husband afford to pay towards her support?

Regarding the rationale for a new property regime, the basic question might well be stated:

Irrespective of how title is held or who has paid for the property, what share of the property should each of the spouses be reasonably entitled to upon the termination of their marriage?

This rather significant difference in approach makes it difficult to use the law of maintenance as a means of achieving an equitable property division. Maintenance is geared primarily to needs and the ability to pay

whereas property disputes, in our view, should be resolved on the basis of what is fair to both parties.

Under the *Divorce Act* courts are allowed to make lump sum and periodic maintenance orders. In several cases the courts, by using lump sum maintenance orders, have achieved what amounts to limited property divisions. These cases, to date, have tended to give the wife a very modest lump sum maintenance award in relation to her husband's total assets. In most of the cases where lump sum awards have been made, the awards have amounted to less than 10% of the husband's assets and often the awards have been in the 5% to 6% range. While in the absence of a satisfactory property division scheme the courts might continue to use the lump sum maintenance order to achieve at least a partial property settlement, we think the better solution would be to adopt a new legislative approach to property division. In our view, maintenance should not be used as a primary tool to secure property divisions—it neither asks the right question nor produces a satisfactory solution.

There is clearly an interrelation between maintenance and the division of property. For example, if significant changes were made in the law governing property rights which resulted in the wife receiving some share of the property, there would be less need for maintenance orders. Indeed, in cases where a married couple had a significant amount of property, the wife's share of that property would often eliminate her need for a maintenance order. At the very least, if a new property scheme were to be adopted, a review of the role of maintenance would be necessary.

Occupation of matrimonial home

A further ameliorating factor, which is ancillary to maintenance, is the right to occupy the matrimonial home. Under the present law, a married woman, particularly one with children, may be given a limited right to occupy the home, even though her husband is the sole owner. But the courts are somewhat reluctant to grant an occupational right to the wife for any substantial period of time. In any event, she receives no ownership interest and her possessory right may be lost on the sale of the home.

Although it may be necessary to confer or preserve a judicial power to allow a spouse, especially one with children, to occupy the matrimonial home, irrespective of who owns it, such a power is not an adequate alternative to an equitable division of ownership rights in the home or other assets acquired during the marriage.

If the law were changed so that both husband and wife shared the ownership of the matrimonial home, it might still be necessary for the court to have a discretion to grant an occupational right to one spouse, for example, the one who has custody of the children. In such a case, it might be desirable to empower the court to postpone any sale of the matrimonial home and distribution of the proceeds in order to accommodate the occupational right granted by the court.

Basic questions concerning possible changes in the law governing property disputes

In order to give our present views concerning both the desirability of change in this area of the law and the possible range of alternatives, we have framed several questions for discussion. The questions involve issues on which opinions may differ. The opinions of members of the public are of great importance. Before final decisions are made in regard to possible changes in the law, it is highly desirable that the public express their views on these matters. The questions, which will be discussed below, are set out at this point in order to give an overview of the range of inquiry which this paper covers.

- Assuming that some change in the law governing the property rights of family members may be recommended, how should the economic interests of the children be best protected?
- Should there be a sharing of at least some property between the spouses irrespective of who paid for it or how title is held?
- If the spouses should share at least some of the property, what assets or property should be subject to the sharing?
- If a sharing of at least some of the property is to take place, when should such a division of the property be permitted and by whom may such a division be sought?
- If a division of at least some of the property at some time is accepted, what are the possible approaches and methods by which such a division may be made?

Assuming that some change in the law governing the property rights of family members may be recommended, how should the economic interests of the children be best protected?

Safeguarding the children's economic needs upon the breakdown of marriage does not solve all of their problems; however, we would be remiss if we did not consider how to best protect those needs when we are considering property issues between the spouses. Whenever there is property to be divided, it must be a primary concern that the interests of the children are not sacrificed. In later papers we shall consider at length the best means of protecting the children of broken marriages and the need to reform the law of maintenance. Although we could wait to give our views concerning the position of children in a property division situation until we have more fully canvassed the areas relating to children and maintenance, we think it desirable to give our provisional views in this paper as to how the financial needs of the children may be affected and best protected upon any division of property between the spouses.

Changes in the law governing property disputes between spouses would have an impact upon the maintenance of the children. At present, the spouse who obtains custody of the children usually contributes to the maintenance of the children only to the extent that the amount of the maintenance order

against the other spouse in favour of the children fails to provide for them. If both spouses were to share the property upon marriage breakdown, they might be required to share the financial responsibility for the upbringing of the children to a greater extent than they now do. However, beyond this rather practical effect, there is a need to consider the possible means of ensuring that the economic interests of the children will not be prejudiced by any regime which allows the property to be divided between the spouses.

There are several methods by which children's economic interests might be protected. They could be protected by the present law of maintenance, by changes in the law of maintenance which would allow and perhaps encourage the use of more effective means of safeguarding children's interests, or by giving the children a share of the property being divided. Regarding this last point, some might suggest that the children should receive an automatic share of the property; however, without reaching any final view on this matter, we suggest that there are certain problems with that approach. First, it is difficult to articulate reasons why the children should be given an outright share. Whereas the wife usually has contributed directly or indirectly toward the acquisition of assets, the children usually have not; indeed, from a purely financial point of view, the children may be regarded as a liability rather than an asset. Subject to the moral and legal obligation of parents to maintain their children, they are not regarded as a part of the economic marriage partnership. Second, young children are of necessity dependent upon their parents or other adults and cannot manage their own affairs or property. Trustees or guardians would likely have to be appointed to look after the property. Also there would be problems in deciding which children should share in the property. In view of these kinds of problems, it is our present view that it may be more desirable to allow the spouses to retain the property and to ensure that the children are adequately supported through the law of maintenance. We invite public response on this issue.

Assuming for present purposes that maintenance will be retained as the primary method of protecting the economic interests of children, we think that the varying financial circumstances of the spouse-parents compel the conclusion that a wide variety of possible maintenance orders should be available to the court. Listed below are a few rather typical factual situations which seem to require different kinds of maintenance orders in favour of children. In stating the possible orders, we have gone beyond the present law in some instances. Where couples have very limited assets upon marriage breakdown, it may only be possible to order periodic maintenance, weekly or monthly, for the children. These orders would be paid out of the future earnings of one or both spouses. In other cases there may be sufficient assets to justify a maintenance order in favour of the children being secured against specific property. In this situation, if the order is not paid, it could be enforced by the sale of the asset upon which the security had been ordered. In still other cases where there may be substantial assets, a lump sum maintenance order might well be used and, if necessary, the

money placed in trust for the children. Or, in this last situation, and perhaps under unusual circumstances, it might be desirable to order either the transfer of certain property to the children or the settlement of certain property upon them. The judge looking at the circumstances of each individual case should be armed with at least these powers to protect the children. A more precise analysis of the kinds of orders that might best protect the interests of children should await our detailed study on the law of maintenance.

Should there be a sharing of at least some property between the spouses irrespective of who paid for it or how title is held?

We are of the view that the present law, and particularly its emphasis upon direct financial contribution, is unfair to the married woman because she is frequently denied an opportunity to make a direct financial contribution toward the acquisition of assets by reason of her role as a homemaker. There seems to be widespread dissatisfaction with the present law and we believe that the great majority of people favour moving to an approach which would provide for some sharing of property between the spouses regardless of who paid for it or how title is held.

If the spouses should share at least some of the property, what assets or property should be subject to sharing?

Here we are considering what property should be subject to the sharing, not the actual share which each spouse should take, although there may be some correlation between these two issues.

A listing of possible alternatives may assist in understanding the precise nature and scope of the question under consideration. The property held by the spouses which should be subject to the sharing could include any of the following:

- all property regardless of when or how acquired
- all property acquired during the marriage
- all property acquired during the marriage excluding certain designated non-sharable assets received by either spouse, which might include gifts from a third party, income received under a trust established by a third party, inheritances, damages received in tort actions, windfalls (lotteries, sweepstakes, gold bricks, bingo, etc.), and earnings or other assets acquired after the spouses ceased to cohabit
- only “matrimonial assets” regardless of when or how they were acquired—“matrimonial assets” might be loosely defined as property which is used chiefly for the benefit of the family—it would exclude, in most circumstances, the business assets of the spouses
- only “matrimonial assets” acquired during the marriage
- only the “home and its contents” regardless of when or how acquired—presumably the “home and its contents” would be more restrictive than the “matrimonial assets”
- only the “home and its contents” acquired during the marriage

It is difficult to justify the application of any fixed rights system to assets owned before the marriage. This approach might result in an unfair distribution in the event of a marriage of short duration. Some individuals might marry because these assets were included; others might refuse to marry, preferring a "common law" relationship. It seems to us that only assets acquired during the marriage should be subject to the sharing. Accordingly, the assets to be shared would have been earned and saved by the joint efforts of both spouses in the vast majority of cases. However, taking this view only narrows the field of choice slightly, and we must consider whether there should be further limitations on the property to be shared.

We think that, under any fixed rights system, gifts or inheritances received by either spouse should not become part of the property to be shared. This view allows the donor to determine who is to receive the gift or inheritance. Moreover, these kinds of assets are not normally acquired through the combined efforts of the spouses. Poll results have indicated that the majority of people think that a spouse receiving a gift or inheritance should be allowed to keep it and that it should not be subject to automatic sharing. There may be other types of property which could be classified as non-sharable such as tort damages, windfalls, and earnings or assets acquired after the spouses ceased to cohabit. We welcome comments from the public respecting types of property or assets which might be classified as non-sharable.

We now address our attention to whether the sharing should be more strictly confined so as to apply only to "matrimonial assets" or "the home and its contents". We expect that views on these questions will differ. Our initial response is that it is difficult to rationalize the sharing of only a part of the assets acquired during the course of the marriage. Subject to the possible exclusions mentioned above, we think that all property acquired during the marriage should be subject to the sharing. We find it impossible to reconcile the rationale for sharing, whether based on partnership or joint contribution, with any decision to restrict the sharing to "matrimonial assets" or the home and its contents. But others may assert that there is no justification for extending the sharing to business assets which can and should be regarded as individual assets rather than family assets. We welcome public response on this issue.

If certain types of property, such as property acquired before the marriage or property received by way of gift or inheritance, are designated as non-sharable property, we recognize at least two problems. First, disputes may arise as to whether certain property was owned by one of the spouses before the marriage. This problem could be resolved by the use of a presumption that all property is to be regarded as having been acquired after the marriage and is therefore subject to the sharing, unless the spouse claiming to the contrary can establish that he or she owned the property before the marriage or that it falls within one of the designated categories of non-sharable property. With many kinds of assets, proof of ownership at the time

of marriage is fairly easy to establish. And proof that property falls into one of the categories of non-sharable property should not present too many difficulties. The second problem is more troublesome: should the interest accruing from, or any capital gain on, property owned before the marriage or acquired as non-sharable property be subject to the sharing? It may be argued that any interest or increase in capital value that accrues during the marriage should be subject to sharing on the same basis as any other property acquired during the marriage. On the other hand, it may be argued that the interest or capital gain should be excluded because it arose from property not subject to sharing. Hypotheticals may be posed and arguments may be made to support either proposition. We are inclined to the view that they should be shared but we invite public opinion on this point.

If a sharing of at least some of the property is to take place, when should such a division of the property be permitted and by whom may such a division be sought?

This question initially seems easy to resolve; however, as the issues unfold the question acquires a measure of complexity. A sharing might conceivably take place in the following circumstances:

- by consent of the spouses
- on the death of either spouse
- on marriage breakdown as evidenced by divorce or nullity
- on *de facto* marriage breakdown even though no legal proceedings in relation to the marriage have been commenced, for example, where the spouses have separated with no reasonable prospect of reconciliation
- on the squandering, wasting, excessive gifting, or gross mismanagement of assets by one spouse
- on the bankruptcy of one spouse

Successive divisions between the same spouses could lead to problems and it seems that in most situations there would be a need for only one sharing. We think that, in the ordinary course of events, any division should be postponed until dissolution of the marriage by death or judicial decree. Although any division proceedings during the lifetime of the parties might be postponed until divorce, it should be possible to calculate the division of the assets by reference to an earlier date, for example, when the parties separated or the marriage broke down.

We recognize that unusual circumstances may justify the sharing of assets at other times. To provide a measure of flexibility, we suggest that the court should entertain any consent application by the spouses for a division of the assets and that either spouse should be entitled to apply to the court for a sharing upon the occurrence of designated events such as those indicated above. Whether the spouses should have an unfettered discretion to secure a division of assets by consent introduces the broader issue of whether the spouses should be allowed to opt out of a statutory

property regime at any time, either before or during marriage. A detailed discussion of this issue will, however, be deferred until the various alternative proposals for statutory reform are set out and considered.

To facilitate a division of assets on divorce, it may be desirable to amend existing procedural rules which require the institution of separate proceedings for the resolution of property disputes. The rules of court in several provinces and territories limit or prohibit the joinder of issues in a divorce petition or action. They do not exclude a judicial determination of the issue of maintenance on divorce but do prohibit the court from resolving any property dispute except by way of separate proceedings. In the interests of reducing expense, confusion, and duplication, and to facilitate a total, rather than piecemeal or fragmented, resolution of all of the economic consequences of divorce, we suggest that these rules of court should be amended. The amended rules should permit the joinder and consolidation of other issues in a divorce petition or action, subject to an overriding discretion in the court to order the institution of separate proceedings where this is considered appropriate. This would enable the courts to resolve the property rights of the spouses as well as their maintenance rights and obligations at the time of the divorce hearing. It seems to us that this should be possible irrespective of whether there are any changes in the statutory property regimes.

We think that only a spouse, or the personal representative of a deceased spouse, should be allowed to institute sharing proceedings. Although creditors may be affected by the sharing, we do not believe that they should be allowed to bring proceedings. It may be necessary, however, to devise measures to protect the interests of creditors once a decision is taken respecting the adoption of a new property regime.

If a division of at least some of the property at some time is accepted, what are the possible approaches or methods by which such a division may be made?

In the following pages we will consider in some detail several alternative approaches which would necessitate changes in the present law. These alternatives may be classified under three general headings: fixed property approaches, discretionary approaches, and hybrid approaches. These three general groupings will be briefly set out, and then various specific approaches under each of them will be considered. It must be admitted that no alternative is free of problems. Different hypothetical factual situations can be postulated to bring out the weaknesses of each alternative.

“Fixed property approaches” are those by which the property may be divided between the spouses according to predetermined shares regardless of the circumstances of the individual case. These approaches involve automatic and mechanical divisions which produce certainty of results. The fixed property approaches which will be discussed in this paper include deferred sharing systems, co-ownership of the matrimonial home, and community property regimes. Each of these results in certain fixed shares upon division which

cannot be varied because of unusual circumstances—each spouse takes his or her designated share.

“Discretionary approaches” involve a judicial discretion to divide property between the spouses. There may be an extensive list of circumstances set out by legislation which the court must consider in the exercise of its discretion, or there may be only very general guidelines. In either event, the court should and must look at certain features of the individual case. Under discretionary schemes, there is a maximum of flexibility to meet the circumstances of the individual case but less certainty or predictability of result.

“Hybrid approaches” combine features of the fixed property approaches with features of the discretionary approaches—there is, therefore, a blending of some certainty with some flexibility. Hybrid approaches have certain problems of their own as well as many of the problems of each of the parent approaches. Several combinations will be proposed and discussed.

Description and Analysis of Various Approaches

I. Fixed Property Approaches

A. Deferred sharing systems

The deferred sharing systems that currently exist in Quebec and in several European countries constitute a compromise between the common law doctrine of separation of property and the civil law doctrine of community of property. During the subsistence of a viable marriage, each of the spouses may acquire, own, control, and dispose of property independently of the other. But on the termination of the marriage by death or divorce, their resources are pooled and equally divided between them. The object of deferred sharing is to ensure that any increase in the wealth of the spouses during the marriage is equally shared. Certain property is generally designated as non-sharable. This typically includes property owned by either spouse before marriage and gifts or inheritances received by one spouse from a third party. Borrowing from several of the deferred sharing systems and from certain proposals made in the Report on Family Property Law recently published by the Ontario Law Reform Commission, the following examples illustrate how a deferred sharing scheme might work in regard to several typical factual situations.

Example # 1

At the time of marriage spouse X had a net worth of \$5,000 and spouse Y had a net worth of \$2,000. During the marriage X inherited \$5,000 from an uncle's estate but Y received no gifts or inheritances. At the end of their marriage X holds \$45,000 worth of property but has

\$15,000 in debts and Y's total property holdings amount to \$10,000 with no outstanding debts. The calculation would be done in the following manner:

X	Y	
45,000	10,000	Value of all property held at time of division
- 15,000	—	Less outstanding debts at time of division
<hr/>		
30,000	10,000	Net worth at time of division
- 5,000	- 2,000	Less net worth at time of marriage
<hr/>		
25,000	8,000	Individual gain (or loss) during the marriage before deduction of non-sharable property (gifts, inheritances, etc.)
- 5,000	—	Less designated non-sharable property received during the marriage (gifts, inheritances, etc.)
<hr/>		
20,000	8,000	Individual gain (or loss) during the marriage
20,000	8,000	
<hr/>		
28,000		Total sharable gain of the marriage

When divided equally each spouse would experience a gain of \$14,000 during the marriage. Accordingly X would be required to transfer \$6,000 to Y. This can be charted as follows:

14,000		Each spouse's share of the gain during the marriage
20,000	8,000	Actual gain of each spouse during the marriage
- 6,000	+ 6,000	Amount required to equalize gain during the marriage
<hr/>		
14,000	14,000	

If one of the spouses comes to the marriage with debts exceeding assets there is a slight problem in calculating that spouse's individual gain (or loss) during the marriage. To illustrate how this could be resolved, let us vary the facts in the above example so that X comes to the marriage with debts exceeding assets by \$10,000 (in other words X has a minus \$10,000 net worth at the time of marriage). In this case, the calculation would be made as follows:

X	Y	
45,000	10,000	Value of all property held at time of division
- 15,000	—	Less outstanding debts at time of division
<hr/>		
30,000	10,000	Net worth at time of division
10,000 (minus net worth)	- 2,000	Less Y's net worth at time of marriage (To reflect the gain of X during the marriage, the 10,000 must be added to the net worth at time of division)
<hr/>		
40,000	8,000	Individual gain (or loss) during the marriage before deduction of non-sharable property (gifts, inheritances, etc.)
- 5,000	—	Less designated non-sharable property received during the marriage (gifts, inheritances, etc.)
<hr/>		

35,000	8,000	Individual gain (or loss) during the marriage
35,000		
8,000		
43,000		Total sharable gain of the marriage
21,500		Each spouse's share of the gain during the marriage
35,000	8,000	Actual gain of each spouse during the marriage
-13,500	+13,500	Amount required to equalize gain during the marriage
21,500	21,500	

Example # 2

Some complexity arises if one of the spouses has not prospered during the marriage. Consider the case where spouse A had a net worth of \$1,000 and spouse B had no assets at the time of marriage. During the marriage spouse A received a gift of \$5,000 from a relative. At the time of the division spouse A has \$10,000 worth of property but has debts amounting to \$15,000. Spouse B has assets worth \$5,000 but has debts of \$2,000. The initial calculation works out as follows:

A	B	
10,000	5,000	Value of all property held at time of division
-15,000	-2,000	Less outstanding debts at time of division
-5,000	3,000	Net worth at time of division
-1,000	—	Less net worth at time of marriage
-6,000	3,000	Individual gain (or loss) during the marriage before deduction of non-sharable property (gifts, inheritances, etc.)
-5,000	—	Less designated non-sharable property received during the marriage (gifts, inheritances, etc.)
-11,000	3,000	Individual gain or loss during the marriage

At this point there are several calculations possible and since each involves a policy choice, we will set out the salient alternatives.

ALTERNATIVE I

Following the method used where both spouses experienced gains during the marriage, the following calculation could be made:

-11,000	A's individual loss during the marriage
3,000	B's individual gain during the marriage
-8,000	Total sharable loss during the marriage
-4,000	Each spouse's share of the loss during the marriage

-11,000		3,000	Actual gain or loss of each spouse during the marriage
+ 7,000	←	- 7,000	Amount required to equalize loss during the marriage
<hr/>			
- 4,000		- 4,000	

The total sharable loss (—8,000) is divided between the spouses with each to have a \$4,000 loss during the marriage. This, in turn, would result in A having to claim against B in the amount of \$7,000 as charted above.

Although this alternative has a certain symmetry in the complete sharing of losses as well as gains, the result may seem unduly harsh to the solvent spouse (B) in that while B's net worth at the time of the division is \$3,000, he or she would owe A \$7,000. On the collection of the \$7,000 by A, his or her negative net worth (—5,000) would be eliminated and A would have a net worth of \$2,000.

ALTERNATIVE II

The Ontario Law Reform Commission has suggested that as a general rule losses should not enter into the calculation and that a "Nil" balance should be substituted. Under this system, the calculation would be as follows:

Nil		3,000	A's individual loss during the marriage
		3,000	B's individual gain during the marriage
<hr/>			
		3,000	Total sharable gain during the marriage
		1,500	Each spouse's share of the gain during the marriage
Nil		3,000	Actual gain or loss (for calculation purposes) during the marriage
+ 1,500	←	- 1,500	Amount required to equalize the gain during the marriage
<hr/>			
1,500		1,500	

Using this alternative B owes A \$1,500.

As illustrated above, this alternative would usually result in the spouse having a gain during the marriage sharing part of those assets with the spouse having a loss during the marriage. The spouse with the gain during the marriage should not be required to become insolvent by the payment of the equalizing claim. To prevent such insolvency, the amount of the equalizing claim would not be allowed to reduce the paying spouse's net worth to less than zero.

ALTERNATIVE III

Where one spouse is insolvent (i.e., has a negative net worth at the time of division) the solvent spouse could be required to transfer to the insolvent spouse an amount equal to half of the negative net worth of the insolvent spouse on the rationale that the solvent spouse should share the debts of the insolvent spouse. The liability of the solvent spouse might be limited so as never to exceed his or her own net worth at the time of division. If the solvent spouse has a net gain during the marriage after paying half of the insolvent's debts, that gain of the solvent spouse could be shared. Following example # 2, the rather complex charting of this alternative works out as follows:

A	B	
10,000	5,000	Value of all property held at time of division
-15,000	- 2,000	Less outstanding debts at time of division
<hr/>		
- 5,000 (net debt)	3,000	Net worth at time of division
+ 2,500 ←	- 2,500	Solvent spouse pays ½ of debts of insolvent spouse
<hr/>		
- 2,500	500	Net worth after solvent spouse pays ½ of debts of insolvent spouse
- 1,000	—	Less net worth at time of marriage
<hr/>		
- 3,500	500	
- 5,000	—	Less designated non-sharable property received during the marriage (gifts, inheritances, etc.)
<hr/>		
- 8,500 (becomes	500	Individual gain (or loss) during the marriage
"Nil")		
Nil		
500		
<hr/>		
500		Total sharable gain during the marriage
250		Each spouse's share of the gain during the marriage
Nil	500	Actual gain or loss (for calculation purposes) during the marriage
+ 250 ←	- 250	Amount required to equalize the gain during the marriage
<hr/>		
250	250	

Arguments may be presented to support any of the three alternatives listed and we anticipate that there will be some difficulty in coming to a final decision as to how to divide assets where one spouse has either a negative net worth at the time of division or has had an individual loss during the marriage. To approach this problem from a slightly different perspective, it should be pointed out that the benefits from a division under a "deferred sharing" approach should accrue to the spouses and not to creditors. A spouse

should, therefore, be allowed to renounce any benefits which might be his or hers upon the division. With the right to renounce, the introduction of a deferred sharing regime would neither detract from the existing rights of creditors nor confer additional benefits on them. Creditors could continue to protect their interests by taking security for loans and unsecured creditors could negotiate loans with both spouses so as to render each spouse liable on the loan. We would not, however, confine the right to renounce to circumstances where there are creditors. In our opinion, a general right to renounce benefits should be given to any spouse who is entitled to a balancing payment upon the division.

Even though the spouse who has suffered a loss during the marriage or who has a negative net worth at the time of division is allowed to renounce any benefits which might be received upon the division, this does not resolve the problem—a choice still must be made between the various alternatives. As mentioned earlier, the complete sharing of losses under Alternative I seems harsh in factual situations where a solvent spouse must become insolvent in paying the balancing claim. Consequently we reject this solution. Alternatives II and III do not require a solvent spouse to become insolvent upon the division. Alternative III focuses upon a limited sharing of the debts of the insolvent spouse whereas Alternative II focuses upon the sharing of the gains of the solvent spouse. Under Alternative III the solvent spouse's position is largely controlled by the amount of debts owed by the insolvent spouse and these may have been incurred under circumstances which would render it inequitable to require the solvent spouse to share them. We are inclined to prefer the sharing of the gain of the solvent spouse under Alternative II because this gives a more consistent result—half of the gain during the marriage is shared with the insolvent spouse subject to the restriction that the solvent spouse is never required to become insolvent. We welcome views and suggestions on these matters.

Example # 3

Since spouses often own property in joint tenancy, it is necessary to consider how this might be treated upon a division during the lives of both spouses. Although the equity could be divided equally between the spouses in a separate calculation, it seems more appropriate to include the property in the general calculation. To illustrate this, assume that spouse C holds \$15,000 worth of property at the time of division exclusive of any joint tenancy property and that spouse D holds \$5,000 worth of property apart from the joint tenancy property. Assume further that C and D hold as joint tenants property worth \$40,000 upon which they still owe \$20,000. Apart from the debt on the joint tenancy property, C owes \$5,000 in debts and D owes \$1,000. To simplify the charting, we will assume that neither spouse brought anything into the marriage and neither acquired any non-sharable property during the marriage. The relevant calculations would be made as follows:

C	D	
		Total value of J-T property held at time of division
20,000	20,000	Divided value of J-T property
15,000	5,000	Plus value of other property held at time of division
<hr/>		
35,000	25,000	Value of all property held at time of division
-10,000	-10,000	Less each spouse's share of total J-T debts—\$20,000
-5,000	-1,000	Less other debts of each spouse
<hr/>		
20,000	14,000	Net worth at time of division
—	—	Less net worth at time of marriage
<hr/>		
20,000	14,000	Individual gain (or loss) during the marriage before deduction of non-sharable property (gifts, inheritances, etc.)
—	—	Less designated non-sharable property received during the marriage (gifts, inheritances, etc.)
<hr/>		
20,000	14,000	Individual gain (or loss) during the marriage
	20,000	
	14,000	
<hr/>		
	34,000	Total sharable gain during the marriage
	17,000	Each spouse's share of the gain during the marriage
<hr/>		
20,000	14,000	Actual gain of each spouse during the marriage
-3,000	+3,000	Amount required to equalize gain during the marriage
<hr/>		
17,000	17,000	

Disputes between spouses as to ownership of joint tenancy property would presumably occur much less frequently under a deferred sharing regime because, except where either or both of the spouses had an individual loss during the marriage, it would rarely, if ever, profit a spouse to establish sole ownership. For instance, even if it were determined that C in the above example owned the joint tenancy property to the exclusion of D, it would not alter the ultimate financial position of the spouses on the division because C would still be required to list the property in his net worth at that time. The charting would be as follows:

C	D	
		Total value of J-T property held at time of division
40,000		Assume a determination that C owned the J-T property
15,000	5,000	Value of other property held at time of division
<hr/>		
55,000	5,000	Value of all property held at time of division
-20,000		Less debt on J-T property 20,000
-5,000	-1,000	Less other debts of each spouse
<hr/>		
30,000	4,000	Net worth at time of division
—	—	Less net worth at time of marriage
<hr/>		

30,000	4,000	Individual gain (or loss) during the marriage before deduction of non-sharable property (gifts, inheritances, etc.)
—	—	Less designated non-sharable property received during the marriage (gifts, inheritances, etc.)
<hr/>		
30,000	4,000	Individual gain or loss during the marriage
30,000	4,000	
34,000		Total sharable gain during the marriage
17,000		Each spouse's share of the gain during the marriage
30,000	4,000	Actual gain of each spouse during the marriage
-13,000	+13,000	Amount required to equalize gain during the marriage
<hr/>		
17,000	17,000	

On these facts the final position of each spouse is the same even though C was regarded as the sole owner of the joint tenancy property.

There remains, however, an area where disputes over ownership of the joint tenancy property could continue to be a problem. Assuming that losses during the marriage are to be carried as "Nil" rather than negative numbers in the calculation, in those cases in which either (or both) of the spouses has had an individual (but not equal) loss during the marriage, it would make a difference whether the joint tenancy property, or indeed any other property whose ownership may be in dispute as between the spouses, is regarded as belonging to one or the other of the spouses or to both. The spouse with the gain (or with the least loss) during the marriage might, in order to protect his or her interests, seek to establish that he or she owned the joint tenancy property to the exclusion of the spouse who had a loss (or greater loss) during the marriage. Indeed, there could be instances where the spouse who had a loss (or greater loss) during the marriage would be inclined to agree that the property belonged to the other spouse because any benefit from sharing the property could otherwise accrue to the sole advantage of creditors. The following chart illustrates how the equalizing claim might be affected by whether the property in question belonged to both or to either of the spouses. The facts on which the chart is based correspond to those in example # 3 except that spouse D has debts of \$30,000 apart from any debt on the joint tenancy property.

If a dispute arises respecting the ownership of property between the spouses for the purposes of calculating their respective assets or liabilities, there would seem to be two possible means of resolving the dispute. The courts might be required to decide the question of ownership in order that the appropriate calculation could be made. In other words, the court decides that the property belongs to him, or her, or to them, and the calculation is

Column 1		Column 2		Column 3	
C	D	C	D	C	D
40,000	40,000	20,000	40,000 20,000	40,000	40,000
15,000	5,000	15,000	5,000	15,000	5,000
55,000	5,000	35,000	25,000	15,000	45,000
-20,000	—	-10,000	-10,000	—	-20,000
-5,000	-30,000	-5,000	-30,000	-5,000	-30,000
30,000	-25,000	20,000	-15,000	10,000	-5,000
30,000	-25,000	20,000	-15,000	10,000	-5,000
—	—	—	—	—	—
30,000	-25,000	20,000	-15,000	10,000	-5,000
30,000	30,000	20,000	20,000	10,000	10,000
—	Nil	—	Nil	—	Nil
30,000	30,000	20,000	20,000	10,000	10,000

Total value of J-T property held at time of division

Determination as to ownership—

Column 1—all to C

Column 2—to C & D jointly

Column 3—all to D

Value of other property at time of division

Value of all property held at time of division

Less debt on J-T property

Less other debts of each spouse

Net worth at time of division

Less net worth at time of marriage

Individual gain (or loss) during marriage

before deducting non-sharable property

Less designated non-sharable property

received during the marriage

Individual gain or loss during the marriage

Total sharable gain during the marriage

(Continued on next page)

(Concluded)

Column 1		Column 2		Column 3	
C	D	C	D	C	D
15,000					
	15,000	10,000		5,000	
30,000	Nil	20,000	Nil	10,000	Nil
-15,000	-----> +15,000	-10,000 -----> +10,000		- 5,000 -----> + 5,000	
15,000	15,000	10,000	10,000	5,000	5,000
15,000	-10,000	10,000	- 5,000	5,000	Nil
				Economic position after equalization payment has been made (assuming spouse D does not renounce benefits)	

Each spouse's share of the gain during the marriage
Actual gain or loss of each spouse during the marriage
Amount required to equalize gain during the marriage

made accordingly. In the proceedings, there could be a presumption that ownership follows the document of title, if any, but a spouse might overcome the presumption by evidence indicating the contrary. Secondly, the law could provide that ownership invariably follows the document of title. In this case, if title stood in joint tenancy, the property would be divided for the calculation. If it stood in the name of one spouse only it would be added to the value of that spouse's assets. In the interests of certainty a choice would have to be made as to which of the above approaches should be adopted. Unless ownership is held to follow the document of title in every case, there might be a proliferation of litigation over ownership. Even so, it must be remembered that issues of ownership would only assume importance where one or both of the spouses has incurred an individual loss during the marriage.

Example # 4

Policy issues and calculation problems arise with respect to whether or not the interest and income received from non-sharable property acquired during the marriage and from property brought into the marriage should be sharable and also in regard to how any appreciation or depreciation in the value of such property should be treated.

To the extent that interest and income from non-sharable property and from property brought into the marriage may be identified and traced, such earnings or assets acquired with them could be either expressly included in or excluded from the sharing. Our tentative view is that interest and income should be shared on the rationale that they are received during the marriage and should be treated in the same way as other earnings during the marriage. This approach avoids the tracing and accounting problems which might be encountered if they were not sharable. While it might be possible for spouses not to commingle their funds and to keep records tracing their earnings to specific sources, we feel that most couples do not and would not keep separate accounts and accurate records. If our present view is accepted, the calculations to be made on a division of assets should pose few problems because only the value of the property at the time of the marriage, or in the case of non-sharable property its value at the time of its acquisition, would need to be established and then deducted from the current net worth of each spouse. We recognize that there may be different views as to whether interest and income should be included in the sharing and welcome public opinion on this matter.

In all of the earlier charting, the value of property owned by each spouse at the time of marriage and the value of the non-sharable property acquired during the marriage have been subtracted from the net worth of the owner-spouse at the time of division in order to arrive at each spouse's individual gain or loss during the marriage. We must consider the possible ramifica-

tions where such property has been retained in specie and its value at the time of division is significantly higher or lower than at the time of marriage or the time of acquisition. Similar problems arise where the property has been sold at a gain or loss and the proceeds, or some of them, remain identifiable or are traceable. Still other problems surface where the property has been sold and the proceeds are untraceable or have been spent.

One solution would be to subtract from the net worth at the time of division the value of the property as of the time of marriage or as of the time of its acquisition, as the case may be. This would result in increases or decreases being shared in the same way as other gains or losses during the marriage. Although there is a degree of simplicity in this solution, it may produce rather harsh results where the increases or decreases account for a large portion of the individual gain or loss of one of the spouses. For example, assume that at the time of marriage spouse J owned a house worth \$25,000 and had other assets worth \$5,000, that spouse K owned assets valued at \$10,000, and that neither had any outstanding debts. At the time of division, assume that the house had appreciated to a value of \$40,000, that J's other assets are valued at \$6,000, K's at \$14,000, that there are no outstanding debts and that neither spouse acquired non-sharable property during the marriage. The above hypothetical will be shown in column I in the chart below. Column II will show the calculation under this approach where the value of the house had declined to \$10,000 at the time of division.

Column I		Column II		
(house appreciated during marriage)		(house depreciated during marriage)		
Spouse J	Spouse K	Spouse J	Spouse K	
46,000 (house 40,000 other assets 6,000)	14,000	16,000 (house 10,000 other assets 6,000)	14,000	Value of all property held at time of division
—	—	—	—	Less outstanding debts at time of division
46,000 -30,000 (house 25,000 other assets 5,000)	14,000 -10,000	16,000 -30,000 (house 25,000 other assets 5,000)	14,000 -10,000	Net worth at time of division Less net worth at time of marriage
16,000	4,000	-14,000	4,000	Individual gain (or loss) during the marriage before deduction of non-sharable property
—	—	—	—	Less designated non-sharable property received during the marriage

Column I		Column II		
(house appreciated during marriage)		(house depreciated during marriage)		
Spouse J	Spouse K	Spouse J	Spouse K	
16,000	4,000	-14,000	4,000	Individual gain (or loss) during the marriage
16,000 4,000		Nil 4,000		
20,000		4,000		Total sharable gain of the marriage Each spouse's share of the gain of the marriage
10,000		2,000		
16,000	4,000	Nil	4,000	Actual gain (for calculation purposes) during the marriage Amount required to equalize the gain during the marriage
- 6,000	6,000	2,000	- 2,000	
10,000	10,000	2,000	2,000	
40,000	20,000	18,000	12,000	Economic position after equalization payment has been made (assuming neither debtor-spouse renounces)

Most of spouse J's gains during the marriage in Column I and all of J's losses in Column II result from the variation in the value of the house. Those favouring this method of calculation would suggest that these increases or decreases should not be treated any differently from other gains or losses during the marriage. However, others might suggest that in certain situations it would be inappropriate to require spouse J to pay an equalizing claim of \$6,000 where the house has appreciated. For example, spouse J may have been a widow or widower with small children at the time of the marriage and may have custody of the children after the dissolution of the marriage. In these circumstances, spouse J might have to sell the house in order to pay the equalizing claim and might not then be financially able to purchase another home. A partial solution to this and similar problems might be to confer special powers on the court with respect to the making of orders for the payment of equalizing claims. For example, the court might be given the power to postpone or delay the actual payment until the children have reached majority or are no longer living in the home. The court might also be given the power to order that security be given to the spouse who is to receive the equalizing claim. We will discuss other possible methods of handling the payment of equalizing claims in due course.

In the situation outlined above where the house declined in value during the marriage, it might also be inappropriate to allow spouse J to

use the loss to reduce the value of his or her gain during the marriage and thereby receive a larger equalizing payment from K.

A second way of dealing with increases or decreases in the value of non-sharable property and property brought into the marriage would be to include the gains but exclude the losses on such property when calculating the individual gain or loss of each spouse during the marriage. This approach attempts to overcome the possible harshness which may result if the spouse with declining-value assets is allowed to reduce his or her individual gain during the marriage by deducting the value of such assets as of the date of the marriage (or the date such assets were acquired in the case of the non-sharable property). Under this approach the net worth at the time of marriage, or the value of the designated non-sharable property, would be reduced to reflect the current value of the property. Following that portion of example # 4 where the house declined in value during the marriage, the charting would be as follows under this approach:

Spouse J	Spouse K	
16,000 (house 10,000 other assets 6,000)	14,000	Value of all property held at time of division
—	—	
16,000	14,000	Net worth at time of division
—	—	
—15,000 (present value of house 10,000, plus 5,000 worth of other assets at time of marriage)	—10,000	Less net worth of K at time of marriage Less net worth of J at time of marriage for calculation purposes (house worth 25,000 at marriage reduced to 10,000 at time of division; other assets worth 5,000 at time of marriage)
1,000	4,000	Individual gain (or loss) during the mar- riage before deduction of non-sharable property
—	—	Less designated non-sharable property received during the marriage
1,000	4,000	Individual gain (or loss) during the marriage
	1,000 4,000	
	5,000 2,500	Total sharable gain of the marriage Each spouse's share of the gain during the marriage
1,000	4,000	Actual gain of each spouse during the marriage
+ 1,500 ←	— 1,500	Amount required to equalize the gain during the marriage
2,500	2,500	

A third alternative would be to adopt the first approach (which provides for the sharing of gains and losses on non-sharable property and on property brought into the marriage in the same manner as other gains or losses), but allow the court to vary the equalizing claim where the calcula-

tion produces grossly unfair results. Despite the desire for certainty, this may be an area where any fixed method of calculation may give unfair results which need to be tempered by a judicial discretion. We are inclined to favour this third approach.

Specific features and problems of a deferred sharing regime

The above examples have ignored certain features of a deferred sharing regime as well as some of the problem areas and these must now be considered.

Equalization payments

Once an equalizing payment has been calculated, questions arise with respect to how it may be collected by the creditor-spouse and as to the powers the court should exercise in enforcing the rights and obligations of the spouses. In view of the variety of economic circumstances in which married persons may find themselves at the time of the division, no single method of handling the payment of equalization claims seems practicable. Consequently, if the parties cannot agree on the method of payment, the courts should be given the flexibility to decide which method of payment is best under the circumstances of the individual case. For example, the equalization payment might be paid out of cash on hand in some cases; in other cases the payment might be made by instalments over a period of time, with or without security being given to guarantee the discharge of the debt; in still other cases, the transfer or sale of specific assets might be required in order for the creditor-spouse to realize his or her portion of the sharable gain during the marriage. While we think that many equalization claims would probably be paid either in cash or on an instalment basis, we are reluctant to limit the options available to the court, provided that the existing rights of third party creditors are not prejudiced. We think the court should be allowed to decide which approach is best under the circumstances of each case; where payments are deferred, however, they should bear interest.

Accounting problems

Under any system which provides for the sharing of assets between spouses there is a need to assess the value of the property held at the time when the division is sought. While the valuation of many kinds of property may not present problems, certain types of property may prove difficult to value. For example, complications may be encountered in attributing a value to pension schemes, to a privately held company or business or to intangible

assets such as patents or copyrights. If the spouses cannot agree on the value of the assets, it is hoped that ancillary services of the court would be available to assist in the valuation and thus avoid the need for extended or expensive litigation.

The valuation of non-sharable property acquired during the marriage and the calculation of net worth at the time of marriage may raise additional problems. Although in many cases the spouses will have had little or no property at the time of marriage, there will be instances where one or both brought substantial assets into the marriage or acquired non-sharable assets during the marriage. In these circumstances, it seems not unreasonable to require the parties to value their assets at the time of marriage or their acquisition if they wish to ensure that they are excluded from the deferred sharing scheme. To assist in the resolution of disputes between spouses, we further suggest that there should be a rebuttable presumption that all property is sharable. Under this presumption, any spouse claiming an exclusive right to property would be required to prove that he or she owned the property before the marriage or that it fell within one of the designated categories of non-sharable property. The spouse so claiming would also be required to establish the value of the property.

It seems fair to conclude that there might be substantial accounting and valuation problems under a deferred sharing scheme patterned along the lines we have suggested. In the final analysis, however, any dispute could be resolved by the courts. Some litigation might be envisaged, therefore, especially in the initial stages following the legislative implementation of any deferred sharing regime. In general, however, a deferred sharing scheme, being premised on fixed rights, should reduce the need for litigation.

Non-sharable property

As indicated previously, in addition to the value of property brought into the marriage, there may be other kinds of property acquired during the marriage which should not be subject to sharing. The designated categories of non-sharable property will be influenced by policy considerations and could be modified over a period of time to reflect changing views of society. We welcome comments on the kinds of acquisitions that might be classified as non-sharable property. By way of guidelines, we will now consider several types of assets which raise classification problems.

Most deferred sharing systems exclude from the division the value of gifts, inheritances, trusts and settlements received by either spouse from third persons. Whether the accumulated value or benefits received under insurance policies are sharable might depend upon who has paid for the policies. For instance, to the extent that a third party has paid for the policy, its value or the benefits under it should be treated as non-sharable property because it is similar to a gift received from a third person. Where a spouse

has paid for a policy, its value or any benefits accruing during the marriage should be included as sharable property, at least where the premiums were paid out of assets which would have been sharable. Indeed, in order to avoid accounting and tracing problems, we are of the opinion that the value and benefits of any insurance policy resulting from premiums paid by a spouse during the marriage should be sharable property regardless of the source of the funds used to pay the premiums. In a recent report on Family Property Law, the Ontario Law Reform Commission made several detailed recommendations respecting the disposition of the value and benefits of insurance policies on the breakdown of marriage or on the death of a spouse. We will briefly summarize the relevant recommendations:

- (i) Benefits and accrued values paid or payable to a spouse under an insurance policy entered into and paid for by a third party should not be included in the sharable property.
- (ii) Where a surviving spouse has been paid the death benefits as the beneficiary under an insurance policy on the life of the deceased spouse, the amount received should be non-sharable regardless of who owned or paid for the policy.
- (iii) Subject to paragraph (ii) above, the value of assets accumulating under insurance policies during the subsistence of the marriage should be shared. Accordingly, where a spouse is a holder or beneficiary of an insurance policy entered into by himself or herself, the following assets should be included as sharable property:
 - (a) any amounts received by that spouse under the policy during the marriage;
 - (b) the value of rights or benefits, such as cash surrender values, which have accrued during the marriage, to which that spouse may be entitled;
 - (c) any amount paid or payable as death benefits to the deceased spouse's estate.
- (iv) Where a spouse has insured his or her own life and has named a third party as beneficiary and the insured spouse dies, the cash surrender value of the policy immediately preceding death should be sharable to the extent that it accrued during the marriage.
- (v) If a spouse has been designated as an irrevocable beneficiary under an insurance policy on the life of the other spouse, the beneficiary may either (i) retain his or her rights as an irrevocable beneficiary with the current value of the policy being excluded from the sharable property of the insured spouse; or (ii) waive his or her rights as an irrevocable beneficiary and have the value of the policy accruing during the marriage included in the sharable assets of the insured spouse.

Just as insurance programs present classification problems, pension plans also give rise to difficulties. The value of rights and benefits under

pension plans are reflected not only in the contributions made by the employee and employer but also in any interest or equity that accrues. Reasonably accurate estimates may be made as to the monetary value of pension plans which have accumulated during the marriage but the question remains as to how benefits, whether by way of contributions, interest, or equity, should be treated—should they be sharable or non-sharable? Given the present widespread lack of rights of a non-contributing spouse in the pension plan of the other spouse, particularly after divorce, we think that contributions or benefits under pension plans that have accumulated during the marriage should be included in the sharable property, at least where there are no rights vesting in the non-contributing spouse. Under plans which directly provide divorced spouses with rights or benefits, it might be left to the court (or possibly the spouse entitled to such rights) to determine whether

- (i) those rights should be accepted and the value of the pension plan excluded from the sharable property; or
- (ii) the rights under the pension should be surrendered and the value of the pension contributions or benefits accumulating during the marriage included in the sharable property. Regardless of the decision taken with respect to current pension plans, we think that the most appropriate long-term solution would involve the development of new policies with respect to pensions. For example, pension programs might be revised so that a married contributor makes equal pension contributions on behalf of each of the spouses with the result that, on termination of the marriage, the spouses have individually vested pension benefits. With this approach, there would be no need to refer to pensions in the calculation of equalizing claims. Certain difficulties will be encountered if the value of pension plans are included in the sharable property. These difficulties arise primarily because the pension may not be readily convertible into cash; it may be difficult or impossible to cash the pension plan and, even if it is possible, there may be substantial tax liabilities incurred by a premature withdrawal of pension contributions or benefits. Furthermore, the cashing of the plan may leave the contributing spouse with little security for old age. These hardships may be avoided to some extent by the debtor-spouse paying the equalizing claim out of other assets, or over a period of time. But there may be spouses close to retirement age whose only substantial asset is the value of a pension plan which has been built up over the years of their marriage and which does not give a divorced spouse any benefits. In such cases, any immediate payment of the equalizing claim would necessarily be made out of money realizable under the pension plan, although the court might be empowered to defer payment and secure the deferred payment as a lien against the pension

benefits. Given the present nature of most pension plans, we believe that the sharing of the value of pension plans is consistent with the sharing of other assets acquired during the marriage and that the problems incurred in such a sharing could be resolved.

Damages for personal injury recovered by one of the spouses during the marriage also raise classification problems. Under some systems, including that operating in the Province of Quebec, damages are not sharable and the spouse who has suffered the injury is entitled to retain the award. In several of the community property states in the United States, damages for personal injury are classified as community property and are sharable. The Ontario Law Reform Commission has recommended that damages awarded to a spouse should be sharable. Those favouring the exclusion of damages from the sharable property suggest that amounts received as compensation for pain and suffering, for loss of amenities, for loss of life expectancy, and for disfigurement are of a very personal nature and should be reserved for the person suffering the losses. On the other hand, it might be pointed out that expenditures for health care, special home care, and medicine will usually have been made out of money that would otherwise have been subject to sharing. In addition, those favouring the inclusion of damages in the sharable property suggest that amounts received for loss of earnings should be included because, if the accident had not occurred, the earnings would have been subject to the sharing. Both points of view have merit with respect to various kinds of losses. If damages were awarded by way of specific allocations to the several types of losses, it might be proposed that compensation for certain losses should not be shared (e.g., amounts awarded for pain and suffering, for loss of amenities, for loss of life expectancy, for disfigurement, and for loss of earnings attributable to any time following the breakdown or termination of the marriage) whereas compensation for other losses should be shared (e.g., amounts awarded for health care or treatment, or amounts representing the loss of earnings of the injured spouse before the breakdown or termination of the marriage). However, awards are not presently broken down into detailed categories and it would be extremely difficult to apportion the damages awarded according to the specific type of loss sustained. There are at least four possible choices. First, all damages could be included in the sharable property. Second, all damages could be excluded. Third, all damages might be included but the court could be given a discretion to exclude all or part of the damages when their inclusion would be inequitable. Fourth, to the extent that courts might specifically designate the damages awarded with respect to each type of loss, some of the damages might be shared and others not shared, perhaps along the lines we earlier set out. Our present view is that the third alternative is preferable, although we recognize this alternative superimposes a measure of discretion upon a system which should operate largely on fixed rules.

There are other kinds of acquisitions which raise classification problems. For example, we invite public opinion on the question whether windfalls, such as winnings from sweepstakes or lotteries and prizes, which have been received during the marriage, should be included in the sharable property.

Another problem incidental to any property regime, including a deferred sharing system, is the determination of the appropriate date by reference to which the rights and obligations of the spouses are determined. The spouses might have been separated for a considerable period of time before seeking to determine their respective property interests. One way to treat assets or property acquired during any period of separation would be to classify these acquisitions as non-sharable property. In our view, the better way of handling this problem under a deferred sharing scheme would be to start from the general proposition that the equalization formula will be applied as of the date of the application for division; however, the court should be allowed to select an earlier date which more realistically coincides with the breakdown of the marriage. This discretionary power should also enable the court to select an earlier date for calculating the equalizing claim where one of the spouses has depleted his or her resources after the separation, or perhaps even before the separation.

Opting out of, or into, the deferred sharing regime

With a deferred sharing regime, or any other matrimonial property regime, it is necessary to decide whether the spouses should be entitled to opt out of the regime. If a deferred sharing regime is introduced in the common law provinces but operates only prospectively, it must also be decided whether spouses may opt into it. Our view is that the parties should be allowed to opt out of, or into, a deferred sharing system and should also be permitted to define their property rights by mutual agreement either before or after marriage, subject only to specified limitations and safeguards. Statutory limitations might perhaps prevent the parties from ousting the court's jurisdiction to award maintenance or from waiving certain provincial rights such as those conferred by dependant's relief legislation. Procedural safeguards, such as a requirement of independent legal advice, might also be adopted to ensure that both parties understand their rights and obligations and freely consent to define their interests by contract. The agreements might well be in writing and could be filed in a central registration office so as to avoid prejudice to the rights of actual and prospective creditors. Given these kinds of limitations and safeguards, we think that married people, including couples where either spouse is under the age of majority, should be allowed to work out their own agreements with respect to property if they do not wish to have the basic statutory regime applied to them. In the absence of any agreement, the basic regime would regulate

their property interests. We are opposed to any statutory regime which totally denies married people an element of choice. The right to opt out of the basic regime is recognized at the present time in both the common law provinces and in Quebec. Indeed, almost all, if not all, of the matrimonial property regimes in other countries allow at least some opting out of the basic regime. The reason for permitting opting out appears to be attributable to the different circumstances in which married couples find themselves; a universal deferred sharing scheme, or perhaps any other fixed rights regime, does not accommodate individual needs, expectations and aspirations. In our opinion, the State should not impose a universal and rigid property regime upon every married couple. Its role should be confined to providing a fair, simple, known, and certain regime for those couples who have not made their own arrangements concerning property. We recognize that the closer the basic legal regime is to the normal desires and expectations of the people, the less need there will be for couples to have their own private agreements. However, even if a significant percentage of couples chose to regulate their property interests by agreement, this would not necessarily reflect adversely upon the basic legal regime but would only evidence the fact that those couples wish to tailor their affairs in accordance with their own desires.

If a new property regime is legislatively endorsed, with or without the freedom to opt in or out, we think that special efforts must be made to inform members of the public, particularly those about to be married, as to how the legal regime operates and, if applicable, how to regulate their property interests by agreement. These efforts might take several forms. Information booklets might be prepared and distributed; information might be circulated by the media; school courses might be structured so as to include information about marriage and divorce and the concomitant legal rights and obligations; and voluntary pre-marriage classes or courses might include such information.

Transitional problems

If the separate property system of the common law provinces were to be replaced by a deferred sharing regime, when would the new scheme come into operation and what property would be subject to sharing under it? Four possibilities will be considered. First, the new regime might be applied only to couples married after its adoption. This approach would not provide a satisfactory solution for those already married unless the spouses were permitted to and, in fact, agreed to opt into the new regime. Second, the new regime might be applied retroactively to all marriages and to all property. We find it difficult to justify the compulsory application of a deferred sharing regime to property accumulated before the introduction of the regime. Third, the new regime might be applied to all assets acquired after its introduction. This would ordinarily involve a valuation of assets on the date of the intro-

duction of the new regime. Fourth, the implementation of the new regime might be deferred for a period of time, perhaps for one year after its enactment, with power in either spouse during that period of time to unilaterally reject the regime as to property held before its implementation. After implementation of the new regime, the spouses could opt out of it or vary it only by mutual agreement. This approach might well result in the new regime being applied to many, if not most, existing marriages.

Examining the various alternatives, we take the general view that any new regime should apply to as many marriages as possible but without retroactive compulsion as to property already held at the time of the implementation of the regime. We therefore suggest that the third and fourth alternatives have special merit and, on balance, we tentatively prefer the fourth. Under this approach, no spouse is "locked into" the new regime with respect to the division of assets already held because either spouse can, within the time limit, reject the new regime as to those assets. We realize that opinions may differ on the respective merits of the various alternatives and we welcome public response to our own tentative views.

Except for the second approach with its compulsory retroactive application, the above alternatives either do not, or may not, resolve the immediate and very real problems facing persons like Mrs. Murdoch, the Alberta ranch wife whose name became a household word in consequence of the decision of the Supreme Court of Canada referred to earlier in this paper. This is because under the first and third approaches, the new regime would not apply to existing marriages or to property acquired before the implementation of the regime, and under the fourth approach either spouse could unilaterally reject the regime's application to assets already held. In order to resolve these immediate problems, we suggest that supplementary legislative solutions might need to be adopted, at least on an interim basis. For example, one of the other basic approaches, such as a discretionary scheme whereby the court may order a transfer of property between spouses, or the legislative implementation of a system of co-ownership of the family home, might be introduced to meet the problems that remain unresolved by the deferred sharing scheme.

Dissipation of assets by spouses—possible controls and sanctions

Under a system of deferred sharing, each spouse is largely free to control and dispose of his or her own property during the marriage. A spouse could take advantage of this freedom by reducing his or her assets thereby depriving the other spouse of a fair sharing. This dissipation of assets might take several forms: the making of excessive gifts to third parties; the sale of property to a relative or friend at a price substantially less than market value; the transfer of assets into a trust or into a secret account; the destruc-

tion of assets; or the squandering of money on unwarranted luxuries or trivia or on riotous living. It seems desirable to consider these kinds of dispositions in some detail.

The making of excessive gifts and the sale of property at unrealistically low prices raise many problems. In a normal sales transaction the vendor spouse will receive money or money's worth for the item sold and there will be no substantial reduction of the spouse's net worth. However, the spouse may sell at a price much lower than normal market value, perhaps to a relative or friend. A spouse may also make substantial gifts of money or property. These transfers must, of course, be detected before any sanction can be invoked. Although it is possible to require the consent of both spouses to the sale of certain types of property (e.g., the consent of the non-owner spouse is often required for the sale of designated real property under the existing dower and homestead laws of several provinces), it would be impracticable to require the consent of both spouses with respect to all sales and gifts. Although it may be impossible to impose a general requirement that the non-owner spouse consent to all sales or gifts, it should always be possible for the spouses to draft and execute consents where one of them is making a substantial gift or sale. This might often avoid the possibility of subsequent disputes. In some, but not all, situations a spouse may know about excessive gifts or sales for less than market value made by the other spouse. To facilitate the discovery of any excessive gifts or sales for less than market value, it might be desirable to impose legal requirements whereby, on the institution of proceedings for a division of assets or, perhaps, from time to time, each of the spouses would make a statutory declaration under oath setting out assets currently held and also the particulars of any substantial gift or sale made without the mutual consent of the spouses during the subsistence of the marriage. In addition, if a spouse discovered that an excessive gift or a less-than-value sale were about to be made, he or she could be given the power to apply to the court in order to prohibit or control some aspect of the gift or sale. The actual or threatened dissipation of assets by a spouse could also serve as a basis for an application to the court by the other spouse to bring about an immediate sharing. In the absence of any mutual resolution of the issues by the spouses, a court, on finding that there had been an excessive gift or improper sale, could be empowered to include the value of the gift (either at the time when it was made or thereafter, whichever is higher) or the loss sustained by reason of the sale in the calculation of the value of the sharable assets of the spouse who made the disposition. The division would then take account of the improper gift or sale and the financial interests of the non-consenting spouse would be protected. The same general approach could be used where one spouse dissipated, destroyed or concealed assets during the subsistence of the marriage. In order to discourage the improper disposition or dissipation of assets, the court might also be given the power to impose an additional financial sanction, whereby a spouse guilty of such conduct might be required to pay an additional premium

to the other spouse, possibly calculated on the basis of a predetermined percentage of the assets in question. These remedies should not, and are not intended to, preclude or prejudice any relief that the non-consenting spouse might have by way of legal proceedings to set aside fraudulent transfers or conveyances. Indeed, insofar as the present law of fraudulent conveyances may be inadequate or ineffective, changes in that law might also be considered.

Excessive or unreasonable spending by a spouse is much more difficult to identify and regulate because the line between the squandering or wasting of assets and simple bad management or poor judgment is sometimes hard to draw. It may also be difficult to ascertain whether only one spouse is responsible for excessive spending and, if not, the extent to which both spouses have directly or indirectly contributed to the excesses. In addition, the life style and the economic circumstances and habits of married persons vary considerably. It would therefore be extremely difficult to define precise guidelines as to whether specific expenditures by one spouse were excessive or unreasonable. As with the case of gifts and sales for less than market value, however, the court should probably be called upon to determine this issue since any attendant difficulties are outweighed by the need for some authoritative check on the squandering or wasting of potentially sharable assets.

Effect of death

Although our consideration of a system of deferred sharing focuses primarily on the marriage breakdown situation, we should comment briefly upon how it might operate on the death of a spouse. The provinces vary in their legislative treatment of the estates of deceased persons and, if the common law provinces were to adopt a deferred sharing system, they might differ as to the application of that system on the death of a spouse. However, in general terms, we think that the dissolution of a marriage by death should not produce markedly different results than where the marriage has broken down during the lives of the parties and to the extent that differences are admitted, they must have a rational foundation. In our opinion, the widow or widower should receive at least the same protection and benefits under the property regime as the divorcee.

In the recent Report of the Ontario Law Reform Commission on Family Property Law, which recommended the introduction of a deferred sharing regime, it was concluded that special rules must be devised respecting the application of the regime on the death of a spouse. Bearing in mind the difficulties of proving net worth at the time of marriage or the value of any non-sharable property acquired during the marriage where one spouse has died, and recognizing the limitations imposed upon the legal representative of a deceased spouse in negotiating agreements or compromises

without first seeking directions from the court, the Ontario Law Reform Commission recommended that the equalizing claim should be calculated on the net estate of each spouse at the time of death and no deductions should be permitted in calculating the value of that estate. The Commission further recommended that no equalizing claims should be payable to the estate of a deceased spouse since the surviving spouse would usually obtain a large part of that estate either by will or on intestacy. The Commission also pointed out that the surviving spouse might have children to care for and that any payment of an equalization claim by the surviving spouse would reduce his or her financial capacity to look after the children. On the other hand, it was recommended that the estate of a deceased spouse should be accountable for any equalizing payment due to the surviving spouse. Where both spouses died at the same time, or in circumstances under which it was impossible to determine which survived the other, the net estates of both would be used to calculate the equalizing claim and the larger estate would pay the required amount to the smaller estate. Arguments may, of course, be presented for and against the above recommendations. The only substantial issue that we would raise at this time is whether there is any real justification for calculating the equalizing claim on death by reference to the "net estate" of each spouse. We seriously doubt whether there is any valid reason for applying a calculation formula on death that is fundamentally different from that applied to a sharing during the lifetime of the spouses.

If any common law province were to adopt a deferred sharing regime operative on marriage breakdown or death, it would be necessary to define the implications and effect of this regime on other provincial statutes regulating inter-spousal rights and obligations and related matters. The introduction of a deferred sharing system would require a review of and presumably amendments to existing provincial statutes such as dower and homestead legislation, maintenance legislation, dependants' relief legislation, testate and intestate succession legislation, gift and estate tax legislation, and land transfer and encumbrance legislation. It might also require amendments to certain federal statutes such as the *Divorce Act* and the *Income Tax Act*.

Ownership and management of assets

One criticism levelled at the deferred sharing regime is that it does not give a spouse, particularly a non-earning spouse, any present ownership interest or any management rights in the assets acquired by the other spouse. The forced sharing comes into effect only at the end of the marriage and there is no provision for a continuous sharing or division of the assets nor for joint management of the assets during the subsistence of the marriage. We take the position that the State should not seek to regulate the economic affairs of on-going marriages; it should confine its attention to regulating

economic factors when the marriage has broken down or has ended by the death of one of the spouses. We believe that the parties to an on-going marriage will and should govern their own economic affairs and consider that any attempted State intervention in day-to-day household economics or management would not materially affect or improve the way in which couples now handle their finances. In some families the husband will control the money, in others the wife will do it—and we see no reason why the State should seek to interfere by directing couples as to how they should manage their economic affairs. We also believe that each spouse should be allowed as much freedom as possible in the management of his or her financial affairs, subject only to certain safeguards such as those outlined in previous pages. We foresee certain problems if the State were to direct that assets or money should be equally divided between the spouses on a continuing basis during the subsistence of their marriage or if requirements were imposed whereby both spouses must concur in all purchases, sales, or other financial expenditures. We accordingly prefer a deferred sharing system and conclude that the State should not attempt to establish a general system of co-ownership or joint management during the subsistence of the marriage. Realizing that opinions may differ on this point, we invite public response to our tentative views.

B. Co-ownership of the matrimonial home

Introduction

With the possible exception of pension benefits that may have accumulated during the marriage, the matrimonial home is frequently the only capital asset of substantial value owned by either spouse. It is not surprising, then, that many inter-spousal disputes have involved ownership of the home. In accordance with the popular notion that the matrimonial home is a family asset rather than an asset belonging specifically to the husband or to the wife, it has been suggested that the law should be changed to provide for co-ownership of the home by the spouses. In its recent Report on Family Property Law, the Ontario Law Reform Commission recommended the legislative implementation of a system of co-ownership, whereby the husband and wife would be entitled to equal shares in and joint control over the matrimonial home with mutual rights of occupation and enjoyment. It also recommended that disposal of the home or any dealing with it should require the consent of both spouses or an order of the court. We do not think that this approach, by itself, goes far enough to overcome the inadequacies of the present law but suggest that it could be used in conjunction with other proposed schemes. It could, for example, be coordinated with a

discretionary regime or a deferred sharing scheme, differing from the latter insofar as it would vest an immediate and continuing joint interest in the home from the date of the marriage.

We recognize that a system of co-ownership could extend to other assets that are acquired or used for family purposes. But there is difficulty in defining "family assets" for the purpose of implementing a more general scheme of co-ownership. For this and other reasons, we will focus our attention primarily upon co-ownership of the home. We will first consider how this might be accomplished. We will then identify certain problems which must be resolved if such a scheme is to be adopted. Lastly, we will attempt to discuss the advantages and disadvantages of this approach.

Ways to accomplish co-ownership of the matrimonial home

We will examine four ways of establishing a system of co-ownership in the matrimonial home, two of which are modelled on foreign legal systems. We will then express our preferences respecting the alternatives. We welcome comments and criticisms of our views.

Voluntary registration

In New Zealand, co-ownership of the matrimonial home may be established by voluntary registration. Under the *Joint Family Homes Act 1964*, as amended, either or both spouses, as owner(s), may settle property as a joint family home and apply to have the settlement registered. Existing creditors may oppose the registration by lodging a caveat. If the debts are paid or the court is satisfied that they can be discharged without recourse to the property, the court may order the caveat removed and the settlement registered. On registration, the spouses become joint owners of the property subject, of course, to any existing mortgages or encumbrances on it. They acquire equal rights as to possession, use, and enjoyment of the property and are both liable for the discharge of obligations or debts arising with respect to the property. Although they may sell the home, neither spouse can unilaterally dispose of his or her share. While the home remains registered, the interests of the spouses in the property are unaffected by the bankruptcy of either spouse; however, under certain conditions, creditors may make application to the court to cancel the settlement. Upon the death of one of the spouses, the surviving spouse takes the property. If both die at the same time or under circumstances which give rise to doubt as to which died first, the estates of each spouse take a one-half interest in the property.

Various kinds of incentives could be adopted to encourage spouses to establish co-ownership in the matrimonial home by a system of voluntary

registration. For example, the joint family home might receive special protection from the claims of creditors, and tax concessions, whether in the form of property tax, gift and estate tax, or income tax, could be introduced to encourage registration. The use of these or other incentives raises issues well beyond the scope of this paper. However, even if such incentives were created, there is little likelihood that all homes would be voluntarily registered.

We do not think that a system of voluntary registration goes far enough to promote co-ownership of the matrimonial home. In our opinion, a system of voluntary registration achieves very little, if anything, that cannot be accomplished under existing law by the spouses voluntarily taking or placing title in their joint names.

Co-ownership by judicial discretion

Courts could be given wide discretionary powers to determine or re-allocate the ownership interests of the husband and wife in the matrimonial home. This approach would be similar to the general discretionary approach discussed in detail later in this paper, except that it would be confined to the matrimonial home. In exercising the judicial discretion, the court might be required to consider, among other factors, the financial contributions made by the husband and wife and their respective contributions to the general welfare of the family. A spouse's interest in the home would, of course, depend upon the court's assessment of the various criteria regulating the discretion. This raises the basic question whether co-ownership of the home should be established upon fixed and certain principles or upon the flexibility and correlative uncertainty inherent in a judicial discretion. In the event that co-ownership of the matrimonial home is established by legislation, we favour a system based substantially upon fixed and pre-determined principles.

Co-ownership by legal presumption

Another way to achieve co-ownership of the matrimonial home is by the application of a legal presumption. This approach has been adopted in the State of Victoria, Australia, where current legislation provides:

[A] husband and wife shall . . . be presumed, in the absence of sufficient evidence of intention to the contrary and in the absence of any special circumstances which appear to the Judge to render it unjust so to do, to hold . . . as joint tenants so much of any real property in question as consists of a dwelling . . . which the Judge is satisfied was acquired by them or either of them at any time during or in contemplation of the marriage wholly or principally for occupation as their matrimonial home.

The judge is expressly prohibited from considering any conduct of the husband or wife which is not directly related to the acquisition of the

property or to its extent or value. Disputes arising under this legislation have usually involved attempts on the part of one spouse to rebut the presumption by evidence to the effect that he or she paid all of the purchase price and always had the intention of being the sole owner. It is possible, however, for the presumption to be rebutted by showing that it would be "unjust" to apply it under the circumstances of the particular case. It should be noted that the presumption of co-ownership does not apply unless the property was acquired primarily as the matrimonial home. Subject to the risk of over-generalization, it seems legitimate to conclude from the judicial decisions that it is difficult to rebut the presumption where both spouses have made some contribution toward the purchase price. However, the absence of contribution does not amount to a "special circumstance" which necessarily precludes application of the presumption.

We think that this method of achieving co-ownership of the home is better than a voluntary registration scheme or the judicial discretion approach. Here, the court starts with the proposition that the home is to be shared unless there is evidence of a contrary intent or unless it would be unfair to share the home. We have reservations about the desirability of allowing "evidence of intention to the contrary" to defeat the presumption. If co-ownership of the matrimonial home through the use of such a presumption is adopted as a partial or supposedly total solution to the problems arising under the present law, we prefer to see the presumption operate as widely as possible and we think that it should be rebuttable only by proof of "special circumstances which appear . . . to render it unjust". We endorse the view adopted in Victoria that inter-spousal misconduct should be irrelevant. We would not allow the presumption to operate, however, in contravention of an express agreement between the husband and wife respecting ownership of the matrimonial home.

Co-ownership by operation of law

Legislation could provide a fixed rule that the matrimonial home automatically belongs to both spouses. Each spouse would then have a present and equal interest in the home without inquiry into contribution, conduct, or the merits of the particular case. One attractive feature of this approach is that it would reduce the incidence of litigation concerning ownership interests in the matrimonial home. On the other hand, it could operate unfairly, as for example, where both spouses have substantial assets but one of them has invested the bulk of his or her assets in the matrimonial home without calling for a financial contribution from the other. While we favour the certainty of result secured under this method of achieving co-ownership, we think that some flexibility might need to be written into such an approach. When this is done, however, the certainty of result is lost and the approach becomes similar in effect to the presumption method described above.

Issues arising under a co-ownership of the matrimonial home approach

We will attempt to indicate issues which would require further consideration if co-ownership of the matrimonial home were to be legislatively endorsed. Our discussion will include some suggested solutions. We invite a public response.

Identification of matrimonial home

There may be a problem in deciding whether certain property is a matrimonial home. For example, would a newly built house which has never been occupied be a "matrimonial home"? Would a lot purchased as a site for a future home be a "matrimonial home"? Should a bank or savings account specifically established for the purpose of buying a home or lot be subject to co-ownership? The extent to which co-ownership would apply to these kinds of situations needs to be defined. With some hesitation, we suggest that co-ownership should be inapplicable to the above circumstances and that it should apply only to real property held by the spouses which has been occupied as their matrimonial home. We also suggest that the principle of co-ownership should not extend to leaseholds or beneficial interests, such as a life interest.

Additional problems arise where spouses own more than one home, where they have owned several homes consecutively, or where the "home" is part of a farm or business. Where the spouses own more than one home, should co-ownership apply to all of them? If not, should the criteria for determining which home is subject to co-ownership be defined by legislation. On the assumption that co-ownership might apply to only one matrimonial home and that the legislation should set out the criteria for determining which home, several kinds of guidelines might be considered. Where the spouses are unable to agree, co-ownership might attach only to the "principal" matrimonial home. Another possibility would be to apply co-ownership to the home in which the parties have the largest equity. Some consideration might also be given to the housing needs of any dependent children, to whether all of the homes are within the same jurisdiction, and to whether all of the homes were acquired during the marriage. We are inclined to the view that no single factor should be determinative and suggest that several of these kinds of factors could be listed as relevant for the consideration of the court in determining which house is subject to co-ownership.

Where spouses have owned several homes consecutively, their latest acquisition will usually be the most valuable and, in this situation, there should be few, if any, problems in applying co-ownership to the currently owned home. However, where the equity of the currently owned home is less than that of a previously owned home, a question arises as to whether

co-ownership should apply to any identifiable surplus arising from the proceeds of sale. A similar problem arises where a home is sold but no new home is acquired. In these circumstances, we favour a sharing of the proceeds of sale.

Special problems arise where the matrimonial home is located within business premises or on a farm because it may not be possible to consider a disposition of the home independently of the business or farm. The interests of a spouse who operates the business or farm must be considered as well as the interests of the other spouse. It seems to us that at least a partial solution would be to ensure that the courts may make a variety of different kinds of orders in these situations. For example, it might be best in some cases to make a money judgment which might be secured by a mortgage on the business or farm.

Application of co-ownership approach

If a system of co-ownership is adopted, we think the spouses should be allowed the freedom to contract out of the scheme either before or during marriage, subject only to the kinds of limitations and safeguards we discussed in relation to opting out of the deferred sharing approach.

We take the view that the right to share the home should not take account of any inter-spousal misconduct. If, contrary to our thinking, some consideration of conduct were deemed to be desirable, we would confine its application to situations where the conduct is "both obvious and gross".

If a system of co-ownership is introduced, we think it should apply retrospectively so as to include a matrimonial home acquired during marriage but before implementation of the new system. We would not allow an owner spouse to unilaterally exclude the operation of the new approach even with respect to a home owned before its implementation. As stated previously, however, we would allow the spouses to opt out of co-ownership by mutual consent.

Should co-ownership apply to a home owned by one of the spouses before their marriage? Where a residence has been purchased before marriage, it is often paid for, at least in part, by mortgage instalments falling due after the marriage. It seems to us that if there is to be an exception, it should be limited to a home that has been fully paid for before the marriage. This still leaves the question whether a home owned free and clear by one of the spouses before marriage should be subject to co-ownership. There are some arguments against applying the co-ownership principle in such a situation. First, the joint efforts of the spouses did not contribute to the acquisition of the home. Second, co-ownership might produce unfair results where a divorcee, widow or widower with children owned a home at the time of remarriage and was divested of a half-interest in that home

after the breakdown or termination of the second marriage. Third, it might seem unfair to apply co-ownership to a home wholly owned by one spouse before the marriage where the marriage survives only for a short time. It seems to us that these particular problems can be effectively met by allowing the spouses a freedom to opt out of co-ownership. An alternative solution would be to give the courts a measure of discretion to qualify or restrict the application of the co-ownership system. We think that there are good reasons why co-ownership should apply to a home owned before the marriage. First, where one spouse owns the matrimonial home at the time of marriage, the contributions and efforts of both spouses which normally might have gone into the purchase of a home will go into other assets which would not necessarily be sharable. On this view of the matter, it would be fair to apply co-ownership to the home owned before the marriage. Second, the home should be, and in our opinion is, regarded as a family asset rather than as a personal asset: it should, therefore, be shared in as many situations as possible irrespective of which spouse paid for it or when it was acquired.

Where the matrimonial home has been received by one of the spouses as a gift or inheritance, we take the provisional view that, unless the donor or testator has expressed an intention that the home is given solely to the one spouse, co-ownership should apply to the home. We do not favour the application of co-ownership where the donor or testator expressly declares an intention to benefit only one spouse. The expressed intention of the donor or testator is entitled to respect and, in our opinion, should prevail. In any event, it would probably be impossible to impose an effective system of co-ownership of the home upon an unwilling donor or testator since the application of the system could easily be avoided by establishing a trust or, more simply, by transferring money, perhaps even the proceeds of sale of the home that would otherwise have been transferred directly.

Adaptation of existing methods of holding property

We do not intend to discuss the technicalities arising under the present law respecting methods whereby property may be jointly owned by the spouses. The pertinent issues have been thoroughly canvassed by the Ontario Law Reform Commission in its Report on Family Property Law and, in general, we endorse their conclusions and recommendations respecting proprietary rights in the matrimonial home.

We would point out, however, that if co-ownership of the home is adopted, certain provincial and federal statutes would require reassessment. For example, the dower or homestead legislation of various provinces would need to be re-examined and might be rendered largely superfluous by a legislative scheme of co-ownership of the home. Changes in provincial land registration schemes might be required. Intestate succession laws, gift and estate laws, the income tax law, and maintenance laws might also require revision.

Effects on creditors

We think that the adoption of a system of co-ownership should not operate so as to benefit or prejudice creditors or third parties. In cases where there are outstanding liabilities against the home that have been assumed by only one spouse, as, for example, where the home was purchased subject to mortgage by one spouse before marriage, we believe the non-mortgagor spouse should be entitled to step into the shoes of the mortgagor spouse in the event of any default. Accordingly, the non-mortgagor spouse should be entitled to resist foreclosure proceedings by assuming the obligations previously imposed upon the defaulting mortgagor. We do not think, however, that the non-mortgagor spouse should be in any way compelled to step into the shoes of the mortgagor. The creditors' sole right of recourse should be against the mortgagor spouse except in those cases where the non-mortgagor spouse voluntarily assumes the rights and obligations outstanding under the mortgage.

Advantages and disadvantages of co-ownership

Viewing marriage as a partnership whose major asset is frequently the matrimonial home, a strong argument can be made for introducing a concept of co-ownership in the home. Although some might question the extension of co-ownership to such things as business assets because these might be regarded as "his" or "hers", we think that the vast majority of people regard the home as "ours" or "theirs". A system which provided for co-ownership of the matrimonial home would, therefore, reflect public attitudes and, at the same time, provide some degree of security for an economically dependent spouse both during the marriage and in the event of marriage breakdown. It would also eliminate most of the uncertainties, technicalities and artificialities of the present law affecting matrimonial property, at least with respect to the matrimonial home. Although a system of co-ownership of the matrimonial home could operate in isolation, it could also co-exist with the proposed alternative regimes without causing unduly complicated problems.

There are certain disadvantages that would arise from merely superimposing a system of co-ownership of the matrimonial home upon existing separate property regimes. The application of a sharing concept which is limited to the home raises certain basic questions and leads to certain anomalies. Why should the sharing be limited to the home? Does this not discriminate unfairly between those couples who own a home and those who do not? Indeed, where no home is owned, this approach does not solve any of the problems arising under the present law. And, even where the spouses own a home, its equity may not represent a very large pro-

portion of the assets held; the pension plan or the contributions to registered retirement savings plans may, for example, far exceed the equity in the home. Or one spouse may have invested his or her capital in the matrimonial home while the other acquired non-sharable assets of substantial value. Is it fair to share only the one asset, namely the home, in these circumstances?

We are of the opinion that the matrimonial home should be co-owned by the spouses but consider such a change in the law should constitute merely part of a general reform of the present law regulating inter-spousal rights to property.

C. Community property regimes

Introduction

A further alternative solution to the problems arising under existing matrimonial property regimes in Canada might be the introduction of a community property regime of the type operating in certain jurisdictions in the United States. Community property regimes also exist in a number of European countries and a detailed examination of these regimes is included in Volumes II and III of the Family Law Project of the Ontario Law Reform Commission. We will concentrate our discussion on the American systems in order to avoid duplication and because recent developments in the United States merit our particular attention. There are presently eight states with community of property regimes—Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. These states have a combined population of more than 40 million people, approximately one-fifth of the population of the United States.

Background and basic concepts

Community property regimes are premised on the concept that marriage is, among other things, an economic partnership which owns the respective talents and contributions of the spouses. Accordingly, whatever is acquired as a result of their respective talents and efforts belongs to and is shared by both spouses equally. In the United States and Europe, the community property regimes are typically imposed by law as an incident of marriage, although the parties are usually free to opt out of the basic regime both before and after marriage.

Community of property regimes generally operate during the subsistence of the marriage as well as on its dissolution by death or divorce. They also recognize and affirm a distinction between the separate property of each spouse and their community property. Property owned by a spouse at the time of marriage or acquired by one spouse after the marriage by way of

gift or inheritance from a third party is separate property; any other property is community property. In all of the eight community property states, however, there is a presumption that all property owned by the spouses is community property and the spouse who claims that certain property is his or her separate property has the burden of establishing this claim. So far as rents, issues, and profits arising from separate property are concerned, there is a lack of uniformity in the United States community property jurisdictions. Idaho, Louisiana and Texas treat rents, issues, and profits arising from separate property as community property. But in the other five states, any accrual to separate property is itself separate property and does not become community property. This latter approach creates tracing and accounting problems.

Under community property regimes, the characterization of property as community or separate depends upon the source of the property, not on the state of the title. For example, the registration of land in the name of only one spouse does not affect or change its character as community property if it was acquired with community funds. Consequently, most disputes over whether certain assets are separate or community property focus upon tracing the funds or credit (e.g., a charge on future income) with which the particular assets were acquired. In some of the community property states, however, there is a rebuttable presumption that a husband, who uses community funds to acquire property in the name of his wife, makes a gift of the property to her separate estate. This presumption evolved at a time when the husband was the sole manager of the community property. It remains to be seen whether it survives recent statutory amendments in some states which have provided for joint management of the community property.

Management powers

A traditional feature of community property regimes has been the husband's authority to act as the sole manager of the community property. The extent of this authority has varied in the American community property systems. In Arizona and Washington, for example, the husband could not unilaterally dispose of community real property. And, in Washington, any gift of community property required the consent of both spouses. In the other community property states, the husband's managerial powers were more extensive and included both personal and real property. In all of them, the husband had to be an honest, but not necessarily a wise, manager. He could, for example, obligate the community on improvident, burdensome or oppressive contracts over the expressed objection of his wife. Recognition of the changing role of women has, in recent years, called into question the husband's traditional authority to manage the community property. There have already been statutory changes in some community property

states and changes are also being contemplated in the remaining jurisdictions. Texas made an initial change in 1967. More significant changes were made in Washington in 1972. Arizona, California and New Mexico also introduced major changes in 1973, although the changes in California only became effective on January 1, 1975. These changes de-emphasize the position of the husband as the manager of the community property and substitute, in one form or another, a system of joint management. What this generally means is that either spouse can manage the community property but certain important transactions, usually involving real estate or substantial assets, require their joint participation. Reported cases have not yet dealt with the precise effects of the various statutory amendments. It may be appropriate, therefore, to exemplify the changes by specific reference to the legislation in Arizona and Washington. In the former state, statutory provisions now regulate the management and control of separate and community property and the liabilities that can be imposed against these properties in the following terms:

25-214. Management and control

- A. The separate property of a spouse shall not be liable for the separate debts or separate property.
- B. The community property is liable for the premarital separate debts or other liabilities of a spouse, and have equal power to bind the community.
- C. Either spouse separately may acquire, manage, control or dispose of community property, or bind the community, except that joinder of both spouses is required in any of the following cases:
 - 1. Any transaction for the acquisition, disposition or encumbrance of an interest in real property other than an unpatented mining claim or a lease of less than one year.
 - 2. Any transaction of guaranty, indemnity or suretyship.

25-215. Liability of community property and separate property for community and separate debts

- A. The separate property of a spouse shall not be liable for the separate debts or obligations of the other spouse, absent agreement of the property owner to the contrary.
- B. The community property is liable for the premarital separate debts or other liabilities of a spouse, incurred after September 1, 1973 but only to the extent of the value of that spouse's contribution to the community property which would have been such spouse's separate property if single.
- C. The community property is liable for a spouse's debts incurred outside of this state during the marriage which would have been community debts if incurred in this state.
- D. Except as prohibited in section 25-214, either spouse may contract debts and otherwise act for the benefit of the community. In any action on such a debt or obligation the spouse shall be sued jointly and the debt or obligation shall be satisfied: first, from the community property, and second, from the separate property of the spouse contracting the debt or obligation.

The above provisions allow each spouse to manage and control his or her separate property and either spouse may manage and control the community property although both must participate in transactions involving real estate or any guarantee, indemnity or suretyship. Subject to these restrictions and

to qualifications respecting pre-marital debts or liabilities, either spouse may render the community liable for debts and obligations incurred.

Section 26.16.030 of the *Washington Revised Code* reads in part as follows:

Either spouse, acting alone, may manage and control community property, with a like power of disposition as the acting spouse has over his or her separate property except:

- (1) Neither spouse shall devise or bequeath by will more than one-half of the community property.
- (2) Neither spouse shall give community property without the express or implied consent of the other.
- (3) Neither spouse shall sell, convey, or encumber the community real property without the other spouse joining in the execution of the deed or other instrument by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument must be acknowledged by both spouses.
- (4) Neither spouse shall purchase or contract to purchase community real property without the other spouse joining in the transaction of purchase or in the execution of the contract to purchase.
- (5) Neither spouse shall create a security interest other than a purchase money security interest as defined in RCW 62A.9-107 in, or sell, community household goods, furnishings, or appliances unless the other spouse joins in executing the security agreement or bill of sale, if any.
- (6) Neither spouse shall acquire, purchase, sell, convey, or encumber the assets, including real estate, or the good will of a business where both spouses participate in its management without the consent of the other: *Provided*, that where only one spouse participates in such management the participating spouse may, in the ordinary course of such business, acquire, purchase, sell, convey or encumber the assets, including real estate, or the good will of the business without the consent of the non-participating spouse.

In addition to restricting the power of the spouse to leave more than his or her one-half share of the community property by will, the above Washington provisions preclude any unilateral gift of community property during the lifetime of the spouses. They also require both spouses to join in the purchase, sale or encumbrance of community real property and in the sale or encumbrance of existing community household goods, furnishings and appliances. If both spouses participate in the management of a business, their joint consent is required for the purchase, sale or encumbrance of any assets of the business, including real estate and the goodwill of the business. Joint consent is not required, however, if the business is managed exclusively by one spouse and the acquisition or disposition is made in the ordinary course of the business.

It seems that the above legislation may not radically affect the way most couples in normal on-going marriages have conducted or will conduct their day-to-day affairs. As always, the management of household finances will typically be resolved by the spouses—in some cases, the husband will assume control, in others, the wife. Apart from the requirement that both spouses must now participate in certain transactions, these general consensual arrangements can continue. In those family situations where both spouses have been jointly involved in the financial decision making, new legislation

should not interfere with their arrangements. The recent statutory provisions are of major import, however, in that they reflect the growing demand for equal rights by abolishing the traditional and discriminatory legal principle whereby the husband had control over the community property.

If community property were to be adopted as the basic regime in any Canadian province, we would favour joint control over the community property, subject to the right of the spouses to agree between themselves as to the management of their assets and affairs. We draw back from any approach under which one spouse is designated the sole manager of the community.

Tracing, commingling and accounting problems

The existence of two different kinds of property—separate and community—creates a number of problems. Not least of these are the tracing and commingling problems inherent in a community system which characterizes property not by its title but by its source or origin. Consider, for example, the circumstance where, at the time of marriage, a spouse holds separate property in the form of shares or real estate. This property may well be sold after the marriage and the proceeds placed in a joint bank account into which both spouses deposit their earnings and from which they meet their expenses. The point is easily reached when it becomes impossible to trace the present holdings in the account to any specific deposit. At that point, because of the presumption that all property owned by spouses is community, unless proof to the contrary, the phenomenon of commingling takes over and the entire account will be treated as community property. This is something which happens quite frequently, particularly in marriages of considerable duration, so that without realizing it, spouses make gifts to each other of one-half interests in their separate property. Additional problems of tracing and commingling are encountered, of course, in those jurisdictions which treat the income or accruals on separate property as separate property.

A more complex problem arises where community funds are used to pay off debts or liabilities on separate property or to improve separate property. In these cases, there is often no problem of commingling because the identity of the asset is never in doubt. For example, one spouse may have purchased a home before the marriage but may have discharged mortgage or tax liabilities or paid for repairs and improvements out of money earned during the marriage. In these circumstances, the house is separate property but the community is entitled to compensation for the use of its funds in the discharge of liabilities on, or the improvement of, the home. The difficulties are compounded where a wife's separate property has been improved by community funds, since it is sometimes contended that the husband intended to make a gift of the community funds to his wife. Similar types of problems arise where separate property has been

used to improve, or discharge debts on, community property. Several rules have been developed to resolve these issues but litigation remains quite common not only between the spouses themselves and their respective successors in interest, such as heirs or beneficiaries, but also between the spouses and third parties, such as creditors or taxing authorities.

Death of a spouse

The concept of a forced share to the surviving spouse is unknown in community property systems. Either spouse can do as he or she pleases with his or her separate property, whether during his or her lifetime or by execution of a will to operate on death. So far as community property is concerned, the death of either spouse terminates the community and the surviving spouse is automatically entitled to his or her one-half interest. Either spouse may dispose of his or her own share of the community property by will and there is no obligation to leave any of it to the survivor.

Although a spouse has unrestricted powers to dispose of his or her share of the community, as well as his or her separate property, by will, various community property states confer a preference on the surviving spouse in the event of an intestacy. In fact, it is common for the entire community property to go to the survivor where his or her spouse dies without a valid will.

Tort claims and liabilities

Our attention has previously concentrated upon the rights of the spouses as between themselves. But many of the serious problems encountered in community property states involve rights and liabilities as between either or both spouses and third parties. In examining the relations between the community and third parties, it is necessary to distinguish between tortious and contractual obligations. Here, we will deal with the former.

Two fundamental questions arise with respect to tortious rights and obligations. The first question concerns the character of damages awarded to a spouse who has sustained loss as a consequence of the tortious conduct of a third party. Are these damages to be classified as the separate property of the injured spouse, or as community property, and are exceptions or qualifications to be admitted to any general classification? The second question concerns the recovery of a judgment for damages against a spouse who has committed a tort upon a third party. Are the damages payable out of the separate property of the offending spouse, out of the community property, or out of separate and community property? The first question was discussed to some extent in connection with the proposed deferred sharing scheme. Let us now briefly examine how both questions are dealt with in the eight community property states.

Arizona, California, Idaho and Washington classify damages awarded to a spouse as community property. This can be rationalized on the basis that such damages are not specifically designated as separate property and therefore constitute community property. An alternative, and perhaps more convincing, rationale is that the damages usually amount to compensation for loss of earning power and out of pocket expenses and, since the earning power is a community asset and the expenses incurred are community liabilities, the recovery is correspondingly a community asset. The other four community property states—Louisiana, Nevada, New Mexico and Texas—reject this approach. They proceed from the assumption that damages are compensation to the victim for a personal wrong and classify them as the separate property of the injured spouse, although any part of the damages which represent reimbursement for actual community expenses will be classified as community property. The law in these jurisdictions is not uniform, however, and differentiates either by the character of the tort or by the circumstance whether the injured party was the husband or the wife.

Our evaluation of the experience in the United States leads us to conclude that the classification of tort damages requires definitive statutory provisions if only to avoid a high incidence of litigation.

With respect to liabilities arising from torts committed by either spouse, there are also conflicting policy considerations. On the one hand, it is desirable to ensure that the victims of tortious conduct actually receive compensation for their injuries or losses. Married couples in community property states usually have more community property than separate property; indeed, they often have little, if any, separate property. Viewed from this perspective, the victim who secures a judgment for damages against a spouse should be entitled to look to the community property for satisfaction of the judgment. On the other hand, it can be argued that the interests and rights of the innocent spouse should be protected and that he or she should not lose any of his or her share of the community property merely because the other spouse has been held liable for tortious conduct. Adopting this argument, only the separate property of the spouse who committed the tort should be available to the injured party. Faced with these conflicting considerations, the community property states have developed four distinct approaches.

Because of the control that has been traditionally exercised by the husband over the community property, some states attach liability to the community assets with respect to all torts committed by the husband but no liability attaches with respect to torts committed by the wife. Many commentators take the view that this approach does not do justice to either of the conflicting policy considerations. It is unfair to the victims of the tortious acts of wives insofar as they have no rights of recourse against the community property and may consequently be denied compensation for their injuries or losses. At the same time, it may be unfair to wives who are deprived of their interest in the community because of the tortious conduct of their husbands, in which they did not participate and

which they may have disapproved. The recent changes in managerial powers may cause a re-appraisal of this approach.

There are other states which hold that the community property is liable to satisfy the judgment for the tortious conduct of either spouse, irrespective of the nature of the tort. This solution, however, tends to over-emphasize the interests of the victim at the expense of those of the innocent spouse.

The third approach focuses upon the circumstances in which the tort was committed. If it occurred in the course of some community activity or enterprise, the community property is liable. In this connection, activities of the community have been generally construed to include not only quasi-business transactions but also day-to-day living arrangements and even community recreation. No liability attaches to the community property, however, where the tort is a purely private affair of one of the spouses.

Under the fourth approach, one-half of the community property is made available to the person injured by the tortious conduct of one of the spouses. This gives some protection to the innocent spouse while, at the same time, affording some measure of relief to the victim of the tort.

Alternative suggestions have been made from time to time with respect to tort liability under a community property regime. For example, one commentator has proposed a combination of the third and fourth approaches. Under this scheme, if the tort were connected with the community, all of the community assets would be available to satisfy any judgment for damages. If, however, the tort were a purely private act of one spouse, only his or her half of the community would be available to satisfy the judgment.

As in the context of classifying damages awarded to the spouse, the conflicting policy considerations must be evaluated for the purpose of defining precise statutory rules respecting the liability of the community property for the tortious conduct of either spouse.

Contractual relationships with third parties

In contracts with third parties, the all-important issue is whether liabilities arising under the contract attach only to the separate property of the spouse, or to the community property, or to both. Two separate problems arise. The first concerns liabilities arising under contracts made before the marriage. The second involves liabilities under contracts made during the marriage. We will consider each of these in turn.

Antenuptial contracts

In the case of antenuptial debts or contractual obligations, two policy considerations come into direct conflict. On the one hand, the community

property of the spouses should not be diminished or impaired by the payment of debts incurred before the marriage which have no direct connection with the marital relationship. On the other hand, persons who perform services, sell goods or extend credit should not be denied payment merely because the debtor has married with the result that his or her subsequent earnings become community property. These conflicting interests have resulted in two basically different approaches in the various states.

Three states—Arizona, New Mexico and Washington—provide that community property is not liable for the antenuptial debts of either spouse. The complete exemption of community property from antenuptial debts may make it impossible for the unsecured creditor to collect from a debtor who subsequently marries; this is sometimes referred to as “marital bankruptcy” because all income acquired after marriage is community property and as such cannot be reached by the antenuptial creditor.

In the other states, the community property has been liable in various degrees for the antenuptial debts of the husband, but not those of the wife, on the basis of the husband’s management and control over the community. To the extent that the husband’s authority has been replaced by joint management powers, it may be that future judicial decisions in these states will render community property liable for the antenuptial debts of either spouse. It should be observed, however, that in the three states mentioned above, where the community property is not liable for the antenuptial debts of either spouse, the adoption of the joint management approach should have no direct effect.

Both of the above extremes seem unfair either to the creditor or to the non-debtor spouse. The complete exemption of community property from antenuptial debts may unduly restrict the creditor’s attempt to obtain payment. Conversely, the imposition of a total liability on the community property to account for the antenuptial debts of either spouse may be unfair to a non-debtor spouse. It seems that a better solution might be reached by way of a compromise whereby antenuptial debts might, in the first instance, be payable out of the separate property of the debtor and then out of his or her one-half interest in the community property. This approach would protect the interest of the non-debtor spouse in the community property, while allowing creditors to reach the debtor’s interest.

Contracts made during marriage

There is confusion and complexity in the various community property states with respect to whether contractual obligations assumed during the marriage are payable out of separate or community property.

Some of the states distinguish between community and separate obligations. Debts contracted by either spouse during the marriage for their common benefit, for the provision of necessities for the family, or in the course of

the business of the community are payable out of community property. If the community funds prove insufficient, the debt becomes payable out of the separate property of the contracting spouse. Other debts unrelated to the marriage partnership are separate obligations payable out of the separate property of the contracting spouse. Where this property is insufficient to discharge the debt, the courts have been reluctant to allow the creditors to reach the contracting spouse's share of the community property. This reluctance has been justified on two bases. First, although the contracting spouse has a right to a share of the community property, that share is not ascertainable until all community debts have been paid and the marriage partnership dissolved. Secondly, it has been held that community property should not be attached by the separate creditors because it should always be available to discharge community obligations, including the maintenance of the family.

Not all community property states draw a distinction between community and separate obligations. In some states, the community property has been held liable for the husband's separate debts as well as the community debts on the basis of the husband's management of the community. Generally, the community property has not been liable for the debts of the wife, unless she acted as an agent of her husband or incurred the obligations in connection with family necessities. In these jurisdictions, the recent or contemplated changes respecting joint management may require or justify changes in the existing rules. The present law in these states has been sharply criticized for treating the community property as though it belonged to the husband. Many commentators have suggested that only one-half of the community property should be reachable by the separate creditors of one spouse.

Concluding observations

A community property regime, particularly one which recognizes the equal rights of the wife in the management of the common assets, has a lot to be said for it. It is a system which recognizes the differing contributions of both spouses and allocates, by operation of law, their property rights as the financial and economic fortunes of the marriage progress. It presumably has psychological advantages as well, in that it substantiates the feelings of the home-making wife that she makes a substantial contribution to, and has a legitimate economic stake in, the marriage. It cannot be doubted, however, that the system may produce serious secondary problems.

Since the spouses may own three distinct kinds of property, namely, the separate property of the husband, the separate property of the wife, and community property, complexities of identification, tracing and commingling are immediately apparent. Furthermore, since different consequences may arise out of the dealings with third parties, whether contractual or tortious, problems may be created either for one or other of the spouses or for third parties. While these problems are by no means insurmountable, and have

been solved in a number of different ways, they have to be taken into account in considering the desirability of adopting the system.

Furthermore, where the system is to be introduced on a state-wide or province-wide basis rather than on a national basis, additional problems can arise when spouses move from a state or province with a community property regime to one with a separate property regime, or vice versa. Although rules have been or are being devised to resolve these problems, they add to the complexities.

The situation must, therefore, be carefully thought out before any decision is made to adopt a community property system in a jurisdiction which previously did not have it. Here, it is relevant to point out that all eight of the community property jurisdictions in the United States have had community regimes since statehood. Several other states adopted community property systems in the 1940's in order to secure certain advantages under federal tax laws but these systems were abandoned when the federal tax laws were changed so as to remove the advantage formerly available in the community property states.

In the final analysis, a choice between a community property system and a deferred sharing regime or a discretionary regime involves complex policy decisions. It may be true that a community property system offers increased protection to the spouses in their common ownership, particularly to the spouse who is not gainfully employed outside the home, and it provides emotional or psychological benefits derived from the feeling of present ownership. These advantages may, however, be set off by the disadvantages of new and complex rules, to be learned not only by the spouses but also by those dealing with them. The choice is not an easy one to make and cannot be undertaken lightly.

Some indication of the merits of the competing claims between a community property regime and a deferred sharing regime may be found by examining the experience in the Province of Quebec which, in 1969, abandoned community property as the basic regime in favour of a deferred sharing scheme. We tend to prefer a deferred sharing scheme to a community property regime because the latter involves fundamental and extensive changes in so many areas of federal and provincial law. Thus, a judge of the Supreme Court of the State of Louisiana has observed:

The community property regime does not merely create a method by which married persons regulate their affairs during the marriage; it regulates inheritance rights, creditors' rights, testamentary rights, contractual rights, and judicial rights.

We would add that a community property regime has significant implications for the law and policy respecting income tax, gift tax and estate tax, insolvency and bankruptcy, and insurance and pensions. A community property regime also affects and must regulate inter-spousal torts, contracts and gifts. Apart from the potential psychological benefits deriving from a community property regime, we question whether the advantages of such

a regime are sufficiently substantial to warrant fundamental changes in so many areas of the law. We also have reservations concerning the capacity of the courts to interpret general statutory provisions establishing a community regime without the benefit of an established theory of community property. This would undoubtedly present special difficulties in the common law provinces of Canada since they have consistently adhered to a separate property regime. It must be recognized, however, that the adoption of a deferred sharing regime would itself raise similar problems and call for many fundamental and complex adjustments in other areas of the law. Indeed, if simplicity and ease of implementation were the decisive criteria for introducing statutory reforms, the discretionary approach is far superior to both the deferred sharing and the community regimes.

II. Discretionary Approaches

The role of the courts in the common law provinces has generally been limited to determining who owned the property. In a series of leading judicial decisions, it has been concluded that the courts have no discretionary power to interfere with title by ordering a transfer of property from one spouse to the other. One way of changing the present law to secure a sharing of assets irrespective of how title has been taken or who has paid for the property would be to confer a statutory discretion on the courts to divide the property between the spouses having regard to the circumstances of the individual case. In order to indicate how this discretion might operate, we will set out the basic legislation which has been adopted in four jurisdictions and, where possible, illustrate how this legislation has been applied by the courts in specific cases. The four jurisdictions selected are New Zealand, England, British Columbia and the Northwest Territories.

Until legislative amendments were introduced in the 1960's and 1970's, the law in New Zealand and England had been similar to the present law of most of the common law provinces in Canada; they had separate property regimes, and in both countries the courts had declined to exercise a discretion to order any transfer or division of property that did not coincide with established title. In order to mitigate the harshness of their traditional separate property regimes, New Zealand in 1963 and England in 1970 passed legislation which specifically gave the courts a discretionary power to interfere with vested ownership rights by ordering a transfer or division of property between the spouses. In 1972, British Columbia, and in 1974, the Northwest Territories enacted legislation conferring a similar discretion on the courts. There have been very few decisions under these provincial statutes and no judgment has yet defined the exact boundaries of the judicial discretion under either of them.

New Zealand

It seems accurate to describe the New Zealand legislation as providing a discretionary approach with relatively few statutory guidelines. Current legislation in New Zealand provides that either of the spouses may make an application to the court to resolve any dispute between them as to title, possession, or disposition of property. The types of order that may be made by the court are set out in section 5(2) of the *Matrimonial Property Act, 1963 (as amended)*, which provides as follows:

5. (2) On any such application the Judge or Magistrate may make such order as he thinks fit with respect to the property in dispute, including but without limiting the general power conferred by the foregoing provisions of this subsection any order for

- (a) The sale of the property or any part thereof and the division or settlement of the proceeds; or
- (b) The partition or division of the property; or
- (c) The vesting of property owned by one spouse in both spouses in common in such shares as he thinks fit; or
- (d) The conversion of joint ownership into ownership in common in such shares as he thinks fit;

and may make such order as to the costs of and consequent upon the application as he thinks fit, and may direct any inquiry touching the matters in question to be made in such manner as he thinks fit.

Section 5(3) further provides:

(3) Subject to the provisions of subsection (2) of section 6 of this Act, the Judge or Magistrate may make such order under this section, whether affecting the title to property or otherwise, as appears just, notwithstanding that the legal or equitable interests of the husband and wife in the property are defined, or notwithstanding that the spouse in whose favour the order is made has no legal or equitable interest in the property.

In considering any application, the factors to be considered by the court are defined in section 6 and 6A as follows:

6. (1) In considering any application under section 5 of this Act, the Judge or Magistrate shall, where the application relates to a matrimonial home or to the division of the proceeds of the sale of a matrimonial home, and may in any other case, have regard to the respective contributions of the husband and wife to the property in dispute (whether in the form of money payments, services, prudent management, or otherwise howsoever).

(1A) The Judge or Magistrate's Court may make an order under section 5 of this Act in favour of a husband or wife, notwithstanding that he or she made no contribution to the property in the form of money payments or that his or her contribution in any other form was of a usual and not an extraordinary character.

(2) The Judge or Magistrate shall not exercise the powers conferred upon him under subsection (2) or subsection (3) of section 5 of this Act so as to defeat any common intention which he is satisfied was expressed by the husband and the wife.

6A. On any application under section 5 of this Act, the Judge or the Magistrate's Court, as the case may be, in determining the amount of the share or interest of the husband or the wife in any property or in the proceeds of the sale thereof, shall not take into account any wrongful conduct

of the husband or the wife which is not related to the acquisition of the property in dispute or to its extent or value.

A careful reading of the above statutory provisions indicates that the court has a wide discretion to make such order in respect of the property in dispute as it sees fit and, in the exercise of this discretion, the court may disregard any proprietary or possessory rights vesting in the spouses. The exercise of the judicial discretion is subject to certain limitations and guidelines. The court *must* have regard to the respective contributions of the spouses, whether financial or otherwise, where the property in dispute is a matrimonial home and *may* have regard to the contributions of the spouses where other property is in dispute. Furthermore, the court may make an order in favour of a spouse who has not made a financial contribution or indeed any contribution of an extraordinary character. The court cannot exercise its discretion so as to defeat any common intention expressed by both spouses. And, in determining the appropriate disposition of the property, the court must not take into account any wrongful conduct which is not related to the acquisition of the property or its extent or value.

The potential significance of the above legislative provisions was defined by a trial judge in the following words:

Formerly, general but fixed principles of the law of property and of contracts have been regarded as the essential framework within which any discretion to resolve property disputes between husband and wife could be worked out. In New Zealand the strict legal or equitable rights of the parties have been held to be decisive, whatever might seem to be the justice of the case . . . [The] solid tug of money has been allowed to submerge any faint suggestion that other considerations could play a valuable part in the acquisition of family assets. But now, by s. 5(3), orders may be made which are 'just', and in making them the Courts are expressly empowered to extinguish established legal or equitable rights—even in favour of a spouse who might entirely lack any such interest. . . . In my opinion, therefore, this legislation should be regarded as designed to bypass solutions which would involve tiptoeing around conventional rules or the attribution of implausible intentions to husbands and wives. These approaches in the past have been unable to produce consistently just results . . . and they have involved the application of presumptions which were developed in a social climate which has little in common with the widely accepted view that marriage is really a partnership of equals. . . . Marriage is a partnership of a very special nature and, with respect, I think this Act puts a proper emphasis upon that fact. In my opinion it enables the Court to consider the true spirit of transactions involving matrimonial property by giving due emphasis not only to the part played by the husband, but also to the important contributions which a skilful housewife can make to the general family welfare by the assumption of domestic responsibility, and by freeing her husband to win the money income they both need for the furtherance of their joint enterprise. Each is in a unique position to support or to undermine the constructive efforts of the other, and it appears to me that considerations of this sort will now properly play a considerable part in the assessment to be made. At least it can be said with confidence that artificial adjustments founded merely on money contributions by the one spouse or the other can now be avoided. . . .

In contrast to the above opinion, which was presented in circumstances where a working wife claimed a share in the matrimonial home, the Court of Appeal in a subsequent case stated that the relevant statutory provisions

do not permit the court to adopt a "community of surplus approach" by ordering an equal division of all assets acquired during the marriage. Thus, one of the judges observed:

. . . I see no justification whatever for the wife being granted a share in the proceeds of the sale of the appellant's interest in the business . . . or in the profits he may have made and saved. The mere fact that a wife has been a good wife and looked after her husband well domestically, cannot possibly, in my opinion, justify an order being made in her favour in respect of a business owned by the husband in the running of which the wife had no share. If orders such as the one made in the present case are permitted under the present legislation, then there are indeed exciting prospects awaiting New Zealand citizens who have started life from humble beginnings and have ended up wealthy men. Such a man may be able to anticipate the kind of order that may be made after his death by transferring a share of his property to his wife in his lifetime without paying gift duty. Even if he does not take this step, yet on his death questions may arise as to assets that really belong to him beneficially. Again, what is to happen with reference to applications under the *Family Protection Act*—a field where New Zealand has led the world—if we are to look at marriage as a partnership? Is a husband obliged to divide his assets between his wife and himself in a reasonable way and then support his wife for life or until her re-marriage out of his share of the assets? Likewise, there are exciting prospects from the point of view of a wife who may be able to go into the arms of her lover well equipped with worldly possessions. All of these problems I would think, will require to be faced before a system based on the community of surplus principle is adopted.

A general examination of the judicial decisions in New Zealand indicates some differences of opinion with respect to the nature of the judicial discretion and the types of property in respect of which the discretion may be exercised. These differences of opinion are partly, if not entirely, attributable to the lack of definitive guidelines in the statutory provisions. In the absence of specific guidelines, the courts are themselves required to develop criteria or rules to determine the disposition of inter-spousal property disputes. Inherent in this process is the opportunity for judges to differ quite markedly in their attitudes and in their judgments. We are of the opinion that the opportunity for any substantial diversity of judicial opinion concerning the interpretation and application of general legislative provisions must be contained by more precise statutory guidelines governing the exercise of the judicial discretion. We are also of the opinion that, while the relevant statutory provisions in New Zealand are capable of being narrowly construed so as to limit the exercise of the judicial discretion, a discretionary regime should ordinarily apply to all assets and should not preclude the court from ordering an equal division of "the community of surplus". We can see no compelling reason why the judicial discretion should not encompass the business assets of either spouse.

Judicial decisions in New Zealand also reflect a broad spectrum with respect to the actual share allocated to a wife. The share has ranged from zero to fifty per cent of the assets acquired during the marriage, with the majority receiving a share in the twenty-five per cent range, although in some cases the property disposition is supplemented by an order for

modest periodic maintenance. We are inclined to the opinion that legislative guidelines might be desirable in order to promote greater equality between the spouses in the division or redistribution of property. The discretionary power of the court should also expressly include the authority to award a money judgment. The current provisions set out in the New Zealand legislation empower the court to order a transfer, sale, division, or the vesting of the property under dispute but do not empower the court to order a money judgment as an alternative.

Finally, we would point out that we do not share the concern expressed by the appellate judge concerning the possible "exciting prospects" which might flow from the application of the judicial discretion to all assets acquired during the marriage, although we recognize the need to harmonize other statutes with the legislative provisions governing property rights. As we have indicated earlier in discussing the various alternative approaches, many statutes, including those governing economic relations within the family, might need to be re-examined if substantial changes were made in the laws regulating matrimonial property.

The *Matrimonial Property Act* does not exclusively define the powers of the court in inter-spousal property disputes. In divorce and nullity proceedings, wide discretionary powers are exercisable by the court under the *Matrimonial Proceedings Act 1963*, as amended. In particular, Part VIII confers wide discretionary powers upon the court to make orders respecting ownership and occupational rights in the matrimonial home and the use and enjoyment of household furniture. The inter-relationship between the *Matrimonial Property Act* and the *Matrimonial Proceedings Act* is discussed in the Report of a Special Committee on Matrimonial Property submitted to the Minister of Justice in June, 1972. Although this report has not resulted in any legislative changes, it proposes the enactment of a single statutory code governing matrimonial property in New Zealand. It also contains certain detailed criticism of the *Matrimonial Property Act*, several of which correspond to the criticisms that we have outlined above.

England

The cornerstone of the law regulating matrimonial property rights in England has been the *Married Women's Property Act of 1882*. This statute constituted a model for legislation in most of the common law provinces in Canada. Consequently, there was for many years a substantial correspondence in the judicial decisions issuing from the courts in England and in the common law provinces with respect to inter-spousal property disputes. In the early 1950's, however, the English courts assumed wide discretionary powers in order to promote equality between the spouses. The exercise of this broad judicial discretion was based upon one specific section of the 1882 statute which provided that, in any dispute between spouses as to title or possession

of property, the court could “make such order with respect to the property in dispute . . . as [it] thinks fit . . .”. The broad discretion survived for almost twenty years in England but never gained wide acceptance in the Canadian courts. In 1969, two decisions of the House of Lords, the highest court in England, dealt a fatal blow to the exercise of wide discretionary powers. These two decisions, which were heavily relied upon by the majority of the Supreme Court of Canada in the *Murdoch* case, concluded that the court must resolve inter-spousal disputes relating to the ownership of property according to established principles of law, and the court has no discretionary jurisdiction to change or transfer ownership on the merits of the particular case. More specifically, the court decided that a spouse cannot successfully claim an interest in property standing in the name of the other spouse unless the claimant has made a direct financial contribution toward the acquisition of the property or possibly an above average indirect financial contribution. The usual and ordinary contributions of a wife to the operation of the home, farm, or business were held to be insufficient to entitle her to any interest in property acquired by the husband. After these decisions, it was clear that any exercise of a judicial discretion in inter-spousal disputes would require authorization by statute. Nor was Parliament slow to respond to these decisions. In 1970, the *Matrimonial Proceedings and Property Act* was passed. The relevant provisions of this statute have now been largely incorporated in the *Matrimonial Causes Act, 1973*. Currently, pursuant to sections 23 and 24 of this Act, on granting a decree of divorce, nullity of marriage, or judicial separation, or at any time thereafter, the court may make orders for the maintenance of family dependants, and may further order the transfer of property or the settlement of property for the benefit of either spouse or of the children of the family. In determining how the discretion of the court should be exercised, whether in ordering maintenance under section 23 or a property disposition or settlement under section 24, the court is required (under section 25) to exercise its discretion so as to place the parties, so far as practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been had the marriage not broken down. Additional specific guidelines are set out in section 25(1) whereby the court shall have regard to the following circumstances:

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;
- (d) the age of each party to the marriage and the duration of the marriage;
- (e) any physical or mental disability of either of the parties to the marriage;

- (f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;
- (g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

Section 25(2) further provides that in deciding whether to exercise its powers to award maintenance or order a property disposition or settlement for the benefit of a child of the family, the following factors shall be taken into account:

- (a) the financial needs of the child;
- (b) the income, earning capacity (if any), property and other financial resources of the child;
- (c) any physical or mental disability of the child;
- (d) the standard of living enjoyed by the family before the breakdown of the marriage;
- (e) the manner in which the child was being and in which the parties to the marriage expected the child to be educated or trained.

The court is then directed to have regard to the resources and needs of the respective spouses and must exercise its powers so as to place the child as far as practicable in the financial position in which he or she would have been if the marriage had not broken down.

The English legislation regulates the economic consequences of marriage breakdown without creating artificial distinctions between maintenance and property dispositions. Although periodic maintenance may be primarily regarded as a charge on future income whereas property dispositions typically involve the distribution of existing capital assets, the boundaries between these two methods of disposing of the financial problems arising on marriage breakdown are not clearly drawn either in fact or in law and, to a large extent, they are interdependent. There seem to be considerable advantages to be gained from the English approach which allows the court to deal with all of the economic readjustment problems of a broken marriage without differentiating the criteria regulating maintenance and those governing dispositions of property.

Although it is dangerous to speculate on the basis of reported cases, which represent only a small proportion of all judgments, it seems that, where property is vested only in one spouse, the courts in England will generally award between one-third and one-half of the value of the property to the other spouse according to the circumstances of the individual case. Where a wife receives less than one-half of the value of the assets, a maintenance order will often be granted which over a period of time will give her a financial return equal to or exceeding half of the value of the property held by the

husband at the time of the original proceedings. The present position in England has been summarized by an appellate judge in the following statements:

If we were only concerned with the capital assets of the family, and particularly with the matrimonial home, it would be tempting to divide them half and half, as the judge did. That would be fair enough if the wife afterwards went her own way, making no further demands on the husband. It would be simply a division of the assets of the partnership. That may come in the future. But at present few wives are content with a share of the capital assets. Most wives want their former husband to make periodical payments as well to support them; because, after the divorce, he will be earning far more than she; and she can only keep up her standard of living with his help. He also has to make payments for the children out of his earnings, even if they are with her. In view of these calls on his future earnings, we do not think she can have both—half the capital assets, and half the earnings.

Under the new dispensation, she will usually get a share of each. In these days of rising house prices, she should certainly have a share in the capital assets which she has helped to create. The windfall should not all go to the husband. But we do not think it should be as much as one-half, if she is also to get periodical payments for her maintenance and support. Giving it the best consideration we can, we think that the fairest way is to start with one-third of each. If she has one-third of the family assets as her own—and one-third of the joint earnings—her past contributions are adequately recognised, and her future living standard assured so far as may be. She will certainly in this way be as well off as if the capital assets were divided equally—which is all that a partner is entitled to.

We would emphasize that this proposal is not a rule. It is only a starting point. It will serve in cases where the marriage has lasted for many years and the wife has been in the home bringing up the children. It may not be applicable when the marriage has lasted only a short time, or where there are no children and she can go out to work.

The possible distinction that might be drawn between “family assets” and “business assets” when the court is exercising its statutory discretion did not assume any importance in the case in which the above statements were made since the only asset in dispute was the matrimonial home. Certain supplementary observations were made, however, that might suggest that the exercise of the discretion may be conditioned by the nature of the assets in dispute. In the latest decision of the English appellate courts, it was decided that the wife cannot directly claim a share in the business assets of her husband where she was not actively engaged in assisting him in the business and merely discharged the duties of a good wife. It was nevertheless concluded that protection could be extended to the wife to some degree as a consequence of the statutory provision which empowers the court to place the parties “in the financial position in which they would have been if the marriage had not broken down”. In reference to the claim of the wife to an interest in the proceeds arising from the sale of the husband’s business, it was stated:

The wife cannot claim a share in the business as such. She did not give any active help in it. . . . All she did was what a good wife does do. She gave moral support to her husband by looking after the home. If he was de-

pressed or in difficulty, she would encourage him to keep going. That does not give her a share.

[But if] this marriage had continued, it is plain that the wife had a good chance of receiving financial benefit on the sale of the business. . . . The husband might well have felt it proper to settle on his wife a substantial sum out of the very large sum which he was receiving. Now that there has been a divorce, she should be compensated for the loss of that chance.

An examination of the cases leaves some uncertainty respecting the extent to which the court will exercise its statutory discretion in cases involving "business assets".

It will be recalled that the English legislation specifically empowers the court to have regard to the conduct of the parties in exercising its statutory discretion. It has been held that, where a wife has cared for the home and looked after the family for many years, the court should not seek to deprive her of benefits merely because she has contributed to the marriage breakdown. Only in cases where her conduct has been "both obvious and gross" will the court "discount" or reduce the benefits that would otherwise have been received.

After examining the merits of the present discretionary system in England as compared with those under a fixed rights regime, the Law Commission concluded that a fundamental change to a fixed rights regime would be undesirable. (See Law Com. No. 52, First Report on Family Property: A New Approach, May 22, 1973, para. 60). The Commission further concluded, however, that the interests of both husband and wife in the matrimonial home should be fully protected and recommended the introduction in England of a principle of co-ownership under which, in the absence of an agreement to the contrary, the matrimonial home would be shared equally between the spouses (*ibid.*, para. 30). This proposal constitutes a substantial change from the existing property regime in England insofar as it confers on each spouse rights in the matrimonial home that are not dependent upon the discretion of the court. The proposal specifically contemplates that the interests of the spouses would arise not from any financial contribution, nor from any contribution to the welfare of the family, nor from any other factors to be assessed by the court, but from the marriage relationship itself. Its advantages were stated to be as follows: it would, in the absence of agreement to the contrary, apply universally; it would acknowledge the partnership element in marriage by providing that ownership of the major family asset would be shared by the spouses; it would provide a large measure of security and certainty for a spouse in case of marriage breakdown or on the death of the other spouse; and it would help to avoid protracted disputes in litigation (*ibid.*, para. 0.28). The merits of the above proposal were considered earlier in this paper when questions relating to co-ownership were discussed in some detail.

British Columbia

Although most of the common law provinces have a section in their married women's property legislation which might have been interpreted as

conferring a measure of judicial discretion to order a division of assets between spouses, Canadian courts have declined to assume any discretionary power to interfere with established title. In British Columbia, however, a broad judicial discretion to order a division of property between the spouses irrespective of who paid for the property or how title is held appears to be conferred upon the courts by section 8 of the *Family Relations Act*, 1972. This section provides that, on the issue of a decree of divorce or judicial separation or on declaring a marriage to be void, or at any time within two years after the date of such a decree, the court may in its discretion, make an order providing for the application of all or part of the property of one spouse for the benefit of either or both spouses or a child of a spouse or of the marriage. The court is further empowered to order that the property be sold and may direct the disposition of the proceeds. The section appears to confer on the court an unfettered discretion to order a transfer or settlement of property or of the proceeds of sale from one spouse to the other or to a child of either spouse. No statutory guidelines are provided to the court respecting the circumstances wherein its discretion should be exercised. Nor has any reported decision discussed the precise implications of the section. Accordingly, until the section has been definitively constructed by the courts, it is difficult, if not impossible, to define the exact boundaries of the judicial discretion.

Northwest Territories

In 1974, the Northwest Territories enacted the *Matrimonial Property Ordinance* to regulate inter-spousal property rights. Many of its sections, which will come into force on a date to be fixed by the Commissioner, follow the pattern of the dower and homestead legislation in the western provinces and regulate the unilateral disposition of residential property by either spouse. Section 28, however, does not fall within this traditional framework and is already in force. In an apparent legislative response to the decision of the Supreme Court of Canada in *Murdoch*, section 28 confers a broad discretion on the court to make inter-spousal property dispositions: Several, but not all, of its provisions seem to be modelled upon sections 5 and 6 of the *Matrimonial Property Act (New Zealand)*, which were discussed previously. Section 28 reads as follows:

28. (1) In any question between a husband and wife as to the title to or possession, ownership or disposition of all property real and personal, the husband or wife or any person on whom conflicting claims are made by the husband and wife, may apply in a summary way to a judge.

(2) Subject to any written agreement to the contrary, in an application under subsection (1) the judge is empowered to make such order with respect to the property in dispute as he considers fair and equitable including an order for one or more of the following:

- (a) the sale of the property or any part thereof and the division or settlement of the proceeds;
- (b) the partition or division of the property;
- (c) the vesting of property owned by one spouse in both spouses in common in such shares as he thinks fit;

(d) the conversion of joint ownership into ownership in common in such shares as he thinks fit;

(e) the transfer from one party to the other party or to a child of either or both parties of such property as he may specify;

and may direct any inquiry or issue touching the matters in question to be made in such manner as he thinks fit and may make such order as to the costs of and consequent on the application as he thinks fit.

(3) Subject to the provisions of subsection (4) the judge may make such order under this section, whether affecting the title to property or otherwise, as he considers fair and equitable, notwithstanding that the legal or equitable interest of the husband and wife in the property is in any other way defined.

(4) In considering an application under this section the judge shall take into account the respective contributions of the husband and wife whether in the form of money, services, prudent management, caring for the home and family or in any other form whatsoever.

(5) A judge making an order under this section may direct the Registrar of Land Titles to cancel, correct, substitute or issue any certificate of title or make any memorandum or entry thereon and otherwise to do every act necessary to give effect to the order.

(6) An order made under this section shall be subject to appeal in the same way as an order made by a judge in an action.

Like the New Zealand legislation, section 28 confers a broad discretion on the court to make such orders respecting inter-spousal disputes involving real or personal property as the court considers fair and equitable. In the exercise of this discretion, the court may disturb existing ownership or possessory rights vested in the spouses. The court is specifically required to take account of the respective contributions of the husband and wife, whether in the form of money, services, prudent management, caring for the home and family or in any other form. Unlike the New Zealand legislation, these factors *must* be taken into consideration irrespective of the type of property in dispute. Furthermore, section 28, in contrast with section 6(2) of the New Zealand statute, does not include any specific provision whereby the exercise of the judicial discretion must be consistent with any common intention expressed by the husband and wife, although such an intention would, no doubt, be of relevance. Nor does section 28 include any express provision dealing with the significance, if any, of the conduct of the parties. It remains to be seen whether the application of section 28 by the courts will mirror the experience in New Zealand and produce differences of judicial opinion with respect to the exercise of the discretion. The lack of definitive guidelines in the section could result in confusion and conflicts of judicial opinion. But only time will tell.

Advantages and disadvantages of the discretionary approach

There are several advantages in a discretionary scheme that enables the court to re-allocate interests in property irrespective of who paid for it and in whose name it is held. In particular, such a scheme admits a maximum

of flexibility that can accommodate the particular circumstances of the individual case. The court can readily differentiate the claim of a hard-working or thrifty spouse and the claim of a lazy or spendthrift spouse. In contrast, the opportunity for distinctions is not generally available under the various fixed rights approaches. Furthermore, although other sharing methods can be applied in conjunction with the resolution of claims for maintenance, the discretionary approach to property distribution can be more easily blended with issues of maintenance thereby avoiding artificial distinctions in the judicial determination of the economic consequences of marriage breakdown. The discretionary approach can also more easily accommodate the interests of any children of the family. The discretionary approach has the additional attraction of simplicity and could accommodate and resolve some of the rather difficult problems that might otherwise arise under a fixed property regime, such as whether the new regime should operate retrospectively. It could also permit the court to make a fair disposition of the property regardless of the time or manner of its acquisition. Finally, a discretionary approach such as that adopted in England might also empower the court to look beyond any negotiated contract or settlement entered into between the parties in order to ensure that no prejudice is sustained by a dependent spouse or by any children of the family.

Certain disadvantages may arise, however, under a discretionary scheme. It promotes less certainty or predictability of result and consequently leads to increased litigation where the parties cannot agree upon a division of their assets. But these factors must not be unduly exaggerated. After an initial period of some uncertainty, guidelines for the distribution of property between the spouses would, no doubt, be provided by judicial precedents. And, once a body of case law has developed, the parties or their lawyers would generally be in a position to negotiate a settlement concerning the appropriate property division without the necessity of recourse to the courts.

A discretionary system also lends itself to uncertainty and inconsistency because individual judges may adopt fundamentally different approaches. It cannot be denied that individual judges might not apply the discretion on a completely uniform basis, but in jurisdictions where a discretionary approach has been adopted—for example, New Zealand, England, and many states in the United States—this eventuality does not seem to have surfaced as a major problem.

The discretionary approach also imposes the burden on the non-owning spouse to institute any judicial proceedings that might be necessary to ensure a fair sharing of the property. This burden may be particularly difficult to discharge where the wife has served only as a homemaker and has limited financial resources. Although litigation is expensive, its results are often unpredictable. For these and other reasons, a growing body of opinion asserts that the married woman should have fixed rights and should not be required to “throw herself on the merciful discretion of the court” in order to secure her fair entitlement.

Perhaps at the risk of over-simplification, a large part of the discussion concerning the various alternative property regimes revolves around the choice between certainty and flexibility. Those preferring certainty of result tend to urge the adoption of one of the fixed rights approaches, whereas those stressing the need for flexibility urge the adoption of a discretionary approach.

Issues arising under the discretionary approach

Certain issues need to be further considered and resolved if a discretionary approach is to be adopted in Canada as a temporary or permanent solution to the problems arising under the present law. In order to focus some attention on the possible resolution of these issues, we have expressed our tentative views on most of them. We invite and welcome public opinion on these matters.

Types of orders

We think that the court should have the power to make any order that seems most appropriate in the circumstances of the particular case. The court should be empowered to partition or divide property, to order the transfer of property or any interest in property, to order a settlement of property, or order the sale of property and a division of the proceeds, or to order money payments in satisfaction of the property claim. We also think that the court should be in a position to defer any disposition of the property, particularly in cases involving the matrimonial home, where it may be desirable to grant occupational rights to the spouse who has the custody of children of the family. If the property dispute is disposed of by an order for the payment of money, the court should be entitled to order that the payment be made by instalments over a period of time, with or without security being given to guarantee the payments and, where payments are deferred, they should bear interest.

Time for judicial disposition

As stated previously with respect to a deferred sharing regime, we think that any division of property should ordinarily be postponed until dissolution of the marriage by judicial decree. Unusual circumstances, however, may justify a division of assets at other times and the exercise of the judicial discretion should not be rigidly confined to the circumstances where divorce is pending. We are of the opinion that the discretionary regime should not come into operation on the death of the parties. Problems respecting the disposition of property on death can, in our opinion, be adequately resolved by a revision

of provincial laws respecting such matters as testate and intestate succession, dower and homestead legislation, and dependants' relief legislation. If it were concluded that a discretionary property regime should apply on death, we reiterate our earlier opinion that the widow or widower should receive no less protection than the divorced spouse.

Sharable property

We think that all property held by the spouses at the time of marriage breakdown should fall subject to re-distribution in the exercise of the judicial discretion. We see no reason to exclude property acquired before marriage or from a third party. There seems no justification for introducing the concept of non-sharable property with respect to a discretionary regime. We are also of the firm opinion that business assets as well as family assets should be sharable by exercise of the judicial discretion.

Retroactive operation

We think that the discretionary powers of the court should be exercisable regardless of the date of marriage or the time and manner of acquisition of the property. The judicial discretion should extend to marriages celebrated, and property acquired, before any legislative implementation of the discretionary scheme.

Opting out of, or into, the discretionary regime

We consider that the parties to a marriage should have a certain degree of flexibility in negotiating agreements to regulate how property is to be held during marriage and how it should be disposed of upon the breakdown of marriage. We favour the type of provision that is currently found in New Zealand where the court is precluded from exercising its discretion with respect to the property in dispute "so as to defeat any common intention... expressed by the husband and the wife". If questions relating to property and maintenance are made subject to the same criteria, as is the case in England, we think that statutory provisions might limit the right of the spouses to oust the court's jurisdiction to award maintenance. We are also of the opinion that the spouses should not be free to interfere with the court's discretion over property or maintenance insofar as it relates to the interests of children of the family. It is possible to argue that any agreement between the spouses respecting the distribution of property should merely be one of the factors that the court should take into account in the exercise of its discretion to re-distribute the property. On balance, how-

ever, we do not favour this latter approach which would render any inter-spousal agreement subject to an overriding discretion in the court.

Dissipation of assets

We do not anticipate any special problems arising under a discretionary regime with respect to the dissipation of assets by a spouse during the marriage. Insofar as the present law respecting fraudulent conveyances may be inadequate or ineffective to protect against the dissipation of assets, changes in that law should be introduced. Provided that there is property available for distribution on the breakdown of marriage, we think that the court could make any appropriate re-adjustment so as to protect the interests of a spouse who has been prejudiced by any disposition of property during the marriage.

General or defined discretion

Our tentative opinion is that any legislation introducing a judicial discretion should attempt to list specific criteria governing the exercise of the judicial discretion. If specific guidelines are not set out in the legislation, extensive and expensive litigation may be necessary before the “ground rules” for the judicial discretion are established and the criteria developed though the cases might not reflect the intention of the legislature. The question therefore arises as to the specific criteria that should be spelled out in the legislation. In our view, this will largely depend on the extent to which there is a blending or fusion of the issues relating to property and maintenance. For example, if these are regulated in the same way, the factors set out in section 25(1) of the English legislation seem quite appropriate. We have some reservations, however, about including “conduct” as a relevant consideration even though it has been interpreted by the English courts as referring only to conduct which is “both obvious and gross”. We think that moral conduct, as distinct from economic conduct, should not be a factor in the division of assets between spouses. We accordingly prefer the New Zealand provision whereby the court “shall not take into account any wrongful conduct of the husband or the wife which is not relevant to the acquisition of the property in dispute or to its extent or value”. Realizing that views may differ on this matter, we welcome public opinion.

There has been some criticism of the English provision which attempts to place the parties in the financial position in which they would have been if the marriage had not broken down. This goal is so rarely attainable that it is open to question whether the supposed criterion has any substantial relevance or value.

If issues relating to property and maintenance are treated separately, several of the factors set out in the English legislation might not be directly relevant to a division of the property. For example, the means and needs of the spouses, their standard of living, and any physical or mental disabilities seem more directly related to the issue of maintenance than to the distribution of property. On the other hand, the contribution made by either spouse in looking after the home and caring for the family appears more relevant to the disposition of the property. The duration of the marriage is also important: generally speaking, the longer the marriage, the greater the sharing. In addition, the loss of potential benefits, such as pension benefits or insurance benefits, should be considered.

We are of the opinion that maintenance and the distribution of property are both integral parts of the economic re-adjustment arising from the breakdown of marriage. We accordingly favour a composite approach and a blending of the criteria so as to allow the court to dispose of all of the economic problems at the same time without recourse to artificial distinctions. This approach would provide flexibility and enable the court to accommodate the particular needs and circumstances of the parties. In some cases, there might be advantages in granting a substantial property settlement with a corresponding reduction or elimination of future periodic maintenance. In other cases, the need for periodic maintenance rather than a substantial property disposition might be more appropriate. Insofar as federal-provincial cooperation would be necessary to achieve a blending or fusion of the issues of property and maintenance, we would urge such cooperation. In this context, special consideration must be given to the Province of Quebec where a deferred sharing scheme currently operates as the basic property regime. Irrespective of any constitutional issues arising, we are of the firm opinion that the Federal Government should, under no circumstances, seek to unilaterally impose a discretionary property regime upon the Province of Quebec. Indeed, we are of the opinion that the Federal Government should not seek to impose any regime upon any of the provinces without prior consultation and approval.

III. Possible Hybrid Approaches

All of the fixed property approaches—deferred sharing, co-ownership of the matrimonial home, and community property—provide automatic divisions which are predictable and relatively certain. The major criticism levelled at these approaches is that they are inflexible and may give rise to hardship or injustice by reason of their failure to take account of the circumstances or merits of the particular case. In contrast, the discretionary approaches are quite flexible and the circumstances of the individual couple may be considered in adjusting their property rights. But a discretionary system promotes unpredictability and uncertainty and also tends to place the burden of initiating litigation upon the economically dependent spouse. In an effort to avoid

some of the more serious objections to either the fixed property or the discretionary approaches, and in order to achieve some sort of balance between the certainty of result provided under the fixed property regimes and the flexibility provided under the discretionary approaches, a blending of the two systems could be attempted. We will briefly discuss several possible hybrid approaches but recognize that other possible combinations could be developed. In any hybrid scheme, there should be some measure of certainty of result coupled with some degree of flexibility under which the court would be allowed to adjust property interests in the light of the circumstances of the individual case.

Co-ownership of the matrimonial home coupled with a judicial discretion over the property

As stated previously, the Law Commission has recommended that co-ownership of the matrimonial home should be introduced to supplement the existing discretionary regime in England. Under this hybrid approach, it would be possible to guarantee to each spouse an equal share in the home, leaving the remaining property to be distributed through the exercise of a judicial discretion. The discretion would, of course, only be invoked if the spouses were unable to reach agreement as to the disposition of the property. This hybrid approach would not only give effect to the notion that the home is a matrimonial or family asset rather than a personal asset belonging to the husband or wife but would also overcome some of the problems arising under each of the parent approaches when operated in isolation. For example, an isolated system of co-ownership of the matrimonial home fails to promote justice where no matrimonial home is owned or where one spouse invests his or her assets in the matrimonial home without calling for any contribution from the other, who may also have substantial but non-sharable assets. These defects are largely overcome by the proposed hybrid in that all property owned by the spouses, with the exception of the co-owned matrimonial home, would be subject to re-distribution by the exercise of judicial discretion. At the same time, the most trenchant criticism of the discretionary approach—that it promotes uncertainty of result—is partially met, at least where the couple owns a home.

It would be possible to modify the proposed hybrid so as to permit the court to deviate from the guaranteed equal division of the matrimonial home. This might be considered appropriate where the marriage was of short duration, where the home was owned by one spouse before the marriage, or received as a gift or inheritance, and perhaps in other cases. To accommodate exceptional circumstances, statutory rules could provide that the spouses shall be entitled to equal shares in the matrimonial home unless the court concludes that this would be unconscionable and orders accordingly. This would, however, introduce into the hybrid a double measure of discretion,

which might be unacceptable since too much discretion breeds too little certainty.

Conversely, it would be possible to extend the principle of co-ownership, with its guaranteed equal sharing, to include "family assets" apart from the matrimonial home. Although there may be little controversy as to whether certain items, such as ordinary household furniture, constitute "family assets", there could be substantial disagreement with respect to other types of property, for example, an automobile, camper, snowmobile, boat, or a valuable collection of paintings or antiques located in the home. Because of the uncertainty inherent in the concept of "family assets", and having regard to the residual discretion vesting in the court under the proposed hybrid, we would be disinclined to extend the principle of co-ownership beyond the matrimonial home.

Despite the stated attractions of the above hybrid approach as a compromise between certainty and flexibility, it must be conceded that many of the practical problems and objections to the respective parent approaches may not be eliminated by its adoption.

Deferred sharing, or community property, subject to an overriding judicial discretion

Where a division of assets is made under either a deferred sharing scheme or a community property regime, each spouse normally receives one-half of the property (or its value) acquired during the marriage. In our discussion of these regimes, we have recognized that there may be isolated instances where the court should be empowered to deviate from the norm. But more fundamental qualifications could be introduced by superimposing a general judicial discretion upon either of the regimes. If this hybrid approach were adopted, it would be necessary to determine the property in respect of which the judicial discretion could be exercised. We think that, if a judicial discretion were superimposed upon either a deferred sharing scheme or a community property regime, it would be arbitrary to limit the exercise of the discretion to the sharable property or the community property. However, the application of the discretion to all property does emphasize flexibility at the expense of certainty and predictability. We find support for this proposed hybrid and also for the application of the judicial discretion to all property in the law of the State of Washington. The current statutory provisions in that jurisdiction (*Wash. Rev. Code* § 26.09.080) were enacted in 1973 and provide as follows:

In a proceeding for dissolution of the marriage, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall, without regard to marital misconduct, make such disposition of the property and the liabilities of the parties, either community or

separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage; and
- (4) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse having custody of the children.

This legislation is substantially similar to the provisions of the *Divorce Act* of 1949 (*Wash. Rev. Code* § 26.08.110) except in one important aspect: it specifically eliminates marital misconduct as a relevant consideration in the exercise of the judicial discretion. In defining and explaining the relevant criteria under the earlier legislation, the Supreme Court of Washington has stated:

RCW 26.08.110 directs that the divorce decree shall make such disposition of the property of the parties, either community or separate, as shall appear just and equitable. We have discussed many times the factors which are to be considered by the court in making a just and equitable disposition of property. They are the merits of the parties; the condition in which they will be left by the divorce; the burdens imposed by child custody; the necessities of the wife and the financial ability of the husband; the age, health, education and employment history of the parties; the future earning prospect of the parties; the sources through which the property was acquired by the parties during the marriage and what properties each brought into or contributed to the community property, and the kinds of property left to be divided at the divorce . . . Under RCW 26.08.110, the separate, as well as the community property of the parties to a divorce is subject to fair, reasonable, and equitable disposition by the court . . .

If marital misconduct is ignored, it seems probable that the normal division under either a deferred sharing scheme or under a community property regime would not be lightly disturbed by the exercise of the judicial discretion. Only in unusual circumstances creating hardship would the court seek to interfere with the operation of the basic regime. Such circumstances might be envisaged where, for example, the marriage is of short duration, or either spouse holds substantial separate property but little or no sharable or community property. If it were considered desirable, it would be possible to expressly confine the exercise of the judicial discretion to circumstances where the application of the basic regime would be unconscionable.

Following the precedent in the State of Washington, it is not envisaged that the judicial discretion should be applicable where the regime is terminated by the death of a spouse; it should only be exercisable upon the dissolution of the regime during the lifetime of the spouses.

Adoption of this proposed hybrid would necessitate changes in procedure in several Canadian provinces so as to permit the joinder of actions involving inter-spousal property disputes with divorce and other matrimonial proceedings. This could be readily accommodated, however, by changes in the present *Divorce Rules* and *Matrimonial Causes Rules*.

The primary justification for superimposing a judicial discretion upon a deferred sharing scheme or a community property regime is that either system may produce unfair results unless tempered by some measure of flexibility. But the proposed hybrid may promote less certainty of result than many people desire. By grafting a general discretion upon either regime, the predictability of result is impaired and neither spouse can be sure where he or she stands with respect to their property rights or interests.

Fixed share subject to judicial increase

Another possible hybrid would be to automatically allocate a certain share of the total property, say one-third, to the economically dependent spouse but confer a discretionary power on the court to increase the basic share. Although this approach may reflect certain judicial attitudes that have been adopted in the resolution of inter-spousal disputes, we think that an unbalanced basic allocation fails to recognize marriage as a partnership of equals.

Related approaches

It may not be accurate to classify the approaches we discuss in this section as being hybrids because they do not necessarily involve a direct blending or fusion of two or more approaches in an effort to achieve a balance between certainty and flexibility. However, it is quite possible that two or more of the alternative approaches might operate at the same time as a consequence of an evolutionary process moving toward ideal ultimate solutions. For example, there is no reason why the discretionary approach cannot be legislatively endorsed as an immediate step. This could be followed in due course by the establishment of a fixed rights approach—perhaps co-ownership of the home or deferred sharing. The latter schemes could displace the discretionary approach, supplement it, or operate independently of it, as might be the case if they were made applicable only to marriages celebrated after their legislative adoption. It would be possible, therefore, for discretionary and fixed property regimes to operate contemporaneously or even conjointly. Ultimately, the evolutionary process might move to a community property regime, with or without a discretionary element.

It is not unlikely that our legislators and the general public will favour an evolutionary or phasing-in process rather than an instantaneous change of fundamental dimensions. With respect to any reformulation of matrimonial or familial property rights, it may be desirable to “make haste slowly”.

Possessory Rights in the Home and Household Effects

Introduction

This paper has concentrated upon inter-spousal rights respecting the ownership of property. But incidental questions of fundamental significance arise with respect to possession of the matrimonial home and the use and enjoyment of household effects. We will accordingly address our attention to these issues.

Possession of the matrimonial home

Where spouses encounter marital conflict which leads to separation, serious problems may arise with respect to the possession and use of the matrimonial home. These problems are not necessarily resolved merely by a determination of which spouse owns the home. This is self-evident, of course, where the home is jointly owned and the spouses find themselves unable to live together anymore. But even where the home is owned by only one spouse, it does not follow that the owner should have the right to possession and use of the home. For instance, the owner may have deserted his or her spouse and their children and it may be desirable to ensure that the abandoned dependants continue to have a roof over their heads. The same problems may also arise where the matrimonial home is rented rather than owned by either spouse.

The present law governing possessory rights in the matrimonial home is somewhat uncertain and is not necessarily consistent in all of the provinces. In certain of the western provinces, for example, dower and homestead legislation imposes specific limitations on an owner's right to dispose of

the matrimonial home during the marriage. In general, we endorse the recommendations of the Quebec Civil Code Revision Office in its Report on the Protection of the Family Residence, whereby the owner of the matrimonial home would be prohibited from disposing of it, encumbering it, or leasing it, without the consent of his or her spouse. Correspondingly, the lessee of the matrimonial home should be prohibited from unilaterally terminating or transferring the lease to the prejudice of his or her spouse or the children. In order for these prohibitions to be effective against third parties, it might be necessary to develop a registration system to identify the matrimonial home. An appropriate registration system was devised in the above Report.

In addition to legislative restraints or prohibitions against the unilateral transfer or disposition of interests in the matrimonial home, the courts should be given a wide range of powers to resolve inter-spousal disputes respecting the possession and use of the home. The types of order that might be made by the court and the criteria for the exercise of any judicial discretion might well correspond to those defined in the *Matrimonial Homes Act* (England), 1967, which was enacted to protect the interest of a non-owner spouse in the family residence. Section 1(3) of that Act provides:

On an application for an order under this section the court may make such order as it thinks just and reasonable having regard to the conduct of the spouses in relation to each other and otherwise, to their respective needs and financial resources, to the needs of any children and to all the circumstances of the case, and, without prejudice to the generality of the foregoing provision,—

- (a) may except part of the dwelling house from a spouse's right of occupation (and in particular a part used wholly or mainly for or in connection with the trade, business or profession of the other spouse);
- (b) may order a spouse occupying the dwelling house or any part thereof by virtue of this section to make periodical payments to the other in respect of the occupation;
- (c) may impose on either spouse obligations as to the repair and maintenance of the dwelling house or the discharge of any liabilities in respect of the dwelling house.

In this context, as in others concerning rights over matrimonial property, we have reservations about including "the conduct of the spouses" as a relevant consideration in the exercise of the judicial discretion. In our opinion, the phrase tends to be interpreted as referring to interspousal misconduct and this perpetuates the myths and injustices that arise under a matrimonial fault or offence concept.

We envisage that possessory rights in the matrimonial home would ordinarily be granted by the courts to a non-owning spouse not for an indefinite, but for a specified, period of time. Orders would typically be granted where no adequate alternative accommodation is available to the non-owner or where dispossession would present special problems for the children. We would not, however, expressly fetter the discretion of the court to override the interests of a title-holder.

In conclusion, we would point out that the regulation of possessory rights in the matrimonial home is necessary regardless of the basic property regime governing rights of ownership.

Household goods

For present purposes, "household goods" may be taken to include all things that are used in or are reasonably necessary for the running of the home, except clothing, jewellery, personal items, and things used by a spouse primarily for business purposes.

The critical question relating to household goods is not so much who owns them but rather who shall have the use and enjoyment of them. As a general rule, an owner is entitled to possession of his or her own assets, but a strict application of this rule to household effects may promote hardship for an economically dependent spouse. This is especially true when the non-owner spouse has to provide a home for the children. A practical solution to this dilemma will not be found in the right of the economically dependent spouse to institute proceedings for maintenance. This course of action may encounter legal obstacles and necessarily involves delay at a time when the needs of the claimant are immediate.

The problems encountered with respect to household goods are aggravated by the ease with which either spouse may ignore the law. Where marital conflict leads to a separation of the spouses, it is not uncommon for one of them to remove the household effects from the residence or apartment without the knowledge or consent of the other. Although this may constitute a breach of the law, at least when done by the non-owning spouse, it is often impractical to seek a remedy by way of legal proceedings, with their concomitant delay and expense.

There would, therefore, appear to be valid reasons why the law should be amended so as to prevent the unjustifiable removal of household goods from the home and to restrain their unilateral disposition or sale by either spouse. These amendments appear to be warranted irrespective of the basic property regime regulating inter-spousal ownership rights.

Restraints on the removal or disposition of household goods

A number of jurisdictions have enacted legislation to restrain the disposition or sale of household goods. In France, for example, neither spouse may, without the consent of the other spouse, sell or dispose of any interest in the household effects. The non-consenting spouse may have any prohibited sale or disposition set aside. And in the State of Washington, current legislation provides that "neither spouse shall . . . sell community house-

hold goods, furnishings, or appliances unless the other spouse joins in executing the . . . bill of sale . . . ”.

The above statutory provisions specifically restrain the sale or disposition of household goods to third parties; they do not resolve the practical problem that arises where one spouse unilaterally removes the household effects from the home. In an attempt to resolve both of these issues, the Quebec Civil Code Revision Office in its Report on the Protection of the Family Residence proposed the following statutory formula:

One consort cannot, without the consent of the other, alienate, charge with a real right or remove from the principal residence of the family . . . household furniture in use by the family.

This provision is not however applicable to the abandoned consort.

The Civil Code Revision Office further proposed that the non-consenting spouse might have any disposition or encumbrance set aside and have the goods restored, unless a third party who had acted in good faith were thereby prejudiced.

All of the above provisions apply to any on-going marriage as well as any marriage threatened by breakdown. By way of contrast, relevant legislation in New Zealand applies only where legal proceedings are pending between the spouses. Thus, section 43 of the *Domestic Proceedings Act* (New Zealand) 1968 provides as follows:

43. (1) Where proceedings for a separation order are pending, no party shall without the leave of a Magistrate or Registrar, or the consent in writing of the other party, sell, charge, or dispose of any of the furniture in the matrimonial home, or (except in an emergency) remove any such furniture from the home.

(2) Any person who does any act in contravention of the provisions of this section commits an offence, and is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding four hundred dollars, or to both.

A second noteworthy feature of the above statutory provisions is the imposition of criminal sanctions, by way of fines and imprisonment, for any prohibited dealing with the household furniture. Criminal sanctions may be justified on the basis that civil remedies, such as the setting aside of prohibited transactions and the restoration of the goods, are insufficient in themselves to deter the improper disposition or seizure of household effects.

The basic issues

It is necessary to address our attention to three basic issues. First, is there a need to ensure that household goods will not be sold, pledged, mortgaged, or removed by one spouse with consequential prejudice to the rights of the other spouse? Second, should any restraints or prohibitions apply at all times during the marriage or only upon some external indication of marital discord, as, for example, when legal proceedings are pending?

Third, what powers or sanctions should be available to the court to remedy possible violations?

Provisional views

We take the provisional view that there is a need to ensure that neither spouse will unilaterally deal with the household goods to the prejudice of the other and that restraints or prohibitions on the disposition or seizure of household goods should apply at all times during the marriage. Despite our general aversion to state intervention in the internal decisions of the on-going family, we are of the opinion that regulation of the use and enjoyment of the household effects should not be confined to situations where there is overt marital discord or where matrimonial proceedings are pending between the spouses. If legislative restraints or prohibitions were so confined, they would, in our opinion, enable a spouse to flout the spirit, if not the letter, of the law and undermine the protection sought to be extended. Legislation such as that in New Zealand fails to recognize that domestic strife, which may lead to an improper disposition or seizure of the household effects, does not necessarily coincide in point of time with the institution of matrimonial proceedings by either spouse.

We accordingly propose that legislation should be enacted whereby, in the absence of the mutual consent of the spouses or an order of the court, neither spouse shall sell, encumber or dispose of household effects in use by the family or remove them from the principal family residence. This prohibition would apply at any time during the subsistence of a marriage and would not be confined to the circumstance where the marriage had overtly broken down or matrimonial proceedings were pending between the spouses.

There may, of course, be exceptional circumstances where hardship might result from such a statutory prohibition. For instance, a deserted husband or wife might, for financial or other reasons, find it necessary to secure alternative living accommodation and would need to remove the household effects to the new location. Or a spouse might disappear without trace. It would be possible to expressly exclude exceptional cases such as these from the operation of the statutory prohibition. This solution was adopted in the proposal of the Quebec Civil Code Revision Office to which we have already referred. An alternative solution would be to admit no exceptions to the general prohibition but to develop procedures whereby either spouse might quickly, easily and inexpensively obtain an order of the court to authorize a disposition or removal of the household goods. We invite public opinion on the respective merits of these alternative solutions.

We now turn to the powers and sanctions that should be available to the court in the event of any actual or prospective unauthorized dealing with household goods. We propose that the court should be entitled to set aside

any unauthorized transaction disposing of the household effects, except where this would prejudice the interests of a third party who has acted in good faith and paid a fair price for them. Where household effects have been removed from the family residence but not transferred to a third party, the court should have the power to order their return. In any case where the court finds it impossible or inappropriate to set aside an unauthorized transaction or order the return of the household effects, it should have the power to order the offending spouse to replace the goods or alternatively award sufficient financial compensation to enable the deprived spouse to replace them. In addition, the court should be entitled to award compensation to a spouse who has suffered undue inconvenience or incurred reasonable expenses as a consequence of being unjustifiably denied the use and enjoyment of the household effects. The court should be empowered to make an order restraining a spouse from selling, encumbering, disposing of, or removing the household goods. It should also be empowered to order either spouse to allow the other the exclusive use and enjoyment of such household goods as may be specified by the court. In considering any application by either spouse for a restraining order or exclusive possession order, the court should be required to take account of all the circumstances, including the interests and needs of any children. With respect to criminal sanctions, we are inclined to endorse the approach adopted in New Zealand, where fines or imprisonment may be imposed by the court for any unauthorized dealings with the household goods.

Realizing that opinions on these issues may differ, we welcome a public response to our conclusions and proposals.

Special problems respecting secured creditors

In devising statutory provisions to regulate the right of either spouse to use and enjoy the household goods, the rights of secured creditors must be borne in mind. Household goods are frequently purchased under a conditional sales agreement or chattel mortgage and, in these circumstances, there may be outstanding obligations to creditors secured by liens attached to the goods. In an attempt to resolve the special problems that may consequently arise, the Law Commission of England formulated the following recommendations in its Working Paper on Family Property Law:

(a) Where a third party has a security interest in respect of any item forming part of the household goods the spouse in possession of that item should be entitled to pay instalments due under the credit agreement, and the third party should be obliged to accept those payments.

(b) The spouse in possession of any item forming part of the household goods should be entitled to receive notice of and to apply to be joined as a party to any proceedings by a third party against the other spouse for repossession of the goods, and to rely on any defence which would have been available to the spouse who had entered into the credit agreement with the third party.

(c) On an application by one spouse against the other spouse concerning the use and possession of any item in respect of which a third party has a security interest the court should be empowered to order either spouse to discharge any liabilities in respect of that item, but such order should be effective only between the spouses and should not impose any liability on a spouse directly enforceable by a third party; nor should it relieve a spouse of any liability to a third party under a credit agreement . . .

In general, we endorse the above recommendations. But we foresee that certain practical difficulties might ensue from a requirement that the creditor must give notice of proceedings to the spouse in possession of the household goods. If this spouse was not a party to the credit transaction, his or her existence may be unknown to the creditor at the time when proceedings are taken to repossess the goods. Subject to resolving this dilemma, we favour the requirement of notice to the spouse in possession of the household goods. We also agree that this spouse should be entitled to take over the payments due under the credit transaction and intercede in repossession proceedings with the same rights and defences as would be available to the spouse who negotiated the transaction.

We conclude, however, that before any such proposals are legislatively endorsed, an attempt should be made to sound out the views of the commercial community, credit granting institutions, and consumer groups.

Conclusion

Much of our attention in this paper has been focused upon the law regulating the property rights of the husband and wife in the common law provinces. In our opinion, the civil law regime in the Province of Quebec has developed property laws that are consistent with contemporary demands for equality between the spouses. In contrast, long established laws in the common law provinces have failed to respond to new and changing societal and individual attitudes and expectations. Historically the common law reflected the popular notion that the husband should be exclusively responsible for managing economic affairs while the wife should be primarily responsible for the day-to-day management of the household and for the upbringing of the children. This division of function led to the evolution of a legal superstructure of rules, responsibilities and disabilities. Thus, societal attitudes premised upon the convenience and welfare of both spouses and the children of a marriage became entrenched in a rigid common law regime that placed substantial disadvantages upon the spouse who stayed at home. The wife and mother, who is today recognized as an equal contributor to the marriage partnership in the social sense, became treated as an inferior and a mendicant in the legal-economic sense. It is generally recognized today that this legal superstructure has fostered injustice and led to invidious sexual discrimination.

The thrust of this paper has been to convey our view that the contribution of a married woman to the family cannot be accurately measured in terms of financial input. Insofar as the law places substantial emphasis upon the financial contribution, we conclude that it perpetuates an unfair and irrational allocation of rights in property.

The proposals in this paper are merely one aspect of a much broader re-allocation of rights and responsibilities that must be brought about if matrimonial justice is to be achieved in Canada. One discrimination based upon sex begets another, no more rational than the first. Just as our property laws have discriminated unfairly against married women, so our maintenance laws have discriminated against married men. Even today, provincial laws fail to respond to the phenomenon of the married woman in the labour force by continuing to impose the obligation to support family dependants primarily, and often exclusively, upon the husband or father rather than upon both spouses or parents. Thus, our present provincial laws entitle a wife to seek maintenance from her husband but confer no corresponding right upon the husband to seek maintenance from his wife. The failure of the law to respond to current social realities and to reflect the changing roles of family members is demonstrated in many areas of Family Law. This paper represents only one part of a wider integrated study of Family Law in Canada, and should be read in that perspective. We are convinced that the need for reform is inescapable and are confident that the sense of justice inherent in the national fabric of Canadian society and its institutions will make reform inevitable.

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Introduction

In this paper, the second of a series of published working papers on family law, the Law Reform Commission of Canada examines the law governing the property relations of married persons, and sets out the major alternatives to the present law. It should be noted that the present property laws affecting spouses are provincial laws, falling within the scope of provincial power to pass laws in relation to "property and civil rights". Our interest in this area is fourfold. First, legislative jurisdiction over "marriage and divorce" is assigned to the Parliament of Canada. Under this head of power, Parliament has legislated in relation to divorce and has provided for divorce maintenance orders in favour of the economically weaker spouse as well as the children of the marriage. It is apparent that questions relating to maintenance cannot be satisfactorily resolved in isolation from issues relating to property rights. A family is an economic unit, and the law should allow a court in divorce proceedings to deal in a comprehensive and coherent fashion with all economic aspects of the family when the marriage is terminated. This includes matters of property as well as matters of maintenance.

Second, while we recognize certain possible constitutional limitations upon direct federal legislative involvement in this field of law, we see a federal responsibility to raise these issues with a view to promoting uniformity, consistency, or at least compatibility among the several provincial regimes regulating matrimonial property rights. It is certainly in order to suggest that federal initiatives would be desirable as a way of encouraging and assisting the provinces and territories to focus their attention on the direction in which the law should move with respect to both property and maintenance questions upon the dissolution of marriage. In addition to playing a role in the coordination of federal and provincial efforts in this field, close federal-provincial cooperation will be necessary in order to ensure that the *Divorce Act* remains abreast of and compatible with new developments affecting matrimonial property law that may be undertaken by the provincial and territorial legislatures.

Third, although studies of matrimonial property problems have been conducted or are under way in Alberta, British Columbia, Ontario, Quebec and Saskatchewan, as well as in the Northwest Territories, not

all provinces and territories have found it possible to devote resources and personnel to this task. We are of the view that federal research can be useful to those jurisdictions in Canada that have not yet been able to conduct studies of their own.

Fourth, in a matter of this nature, that transcends the divisions of legislative jurisdiction and affects every married person in Canada, we are of the view that the Law Reform Commission of Canada has a responsibility to assist Canadians in informing themselves about the present generally unsatisfactory state of the law, and to set out the major alternatives so that interested members of the public may express their views.

We wish to make it clear that the aim of this paper is not to attempt to arrive at a federal solution to problems which in some aspects fall within federal legislative jurisdiction and in others, under provincial and territorial jurisdiction. It would be possible to amend the *Divorce Act*, subject to constitutional limitations, to provide for property distribution on divorce, just as it would be possible to amend that Act to accommodate property distribution schemes developed by the provincial and territorial legislatures. At this point, however, we believe the priority is to identify what can or should be done in this vital area in an atmosphere that is unclouded by manoeuvrings for or assertions of constitutional supremacy by either level of government. The value of some substantial changes in the laws governing matrimonial property rights and relationships will speak for itself. Once this has been considered by the governments of all affected jurisdictions in Canada, we trust that the desirability of appropriate cooperative action will call into being the necessary mechanisms for achieving the goal of major reforms in this area.

Family property law reform is inseparable from the fact that the present law is in many aspects a relic of centuries of a different concept of the status of women. There are historical, religious, legal, economic and political reasons for this which can be used to explain the present state of the law. But when weighed against the demands of simple justice for all persons, regardless of sex, none of these reasons or explanations provides any justification for perpetuating the existing legal inequalities. The conscience of Canadians was shocked by the application of the present law in the recent Supreme Court of Canada decision of *Murdoch v. Murdoch*, in which a married woman unsuccessfully sought to obtain a property interest in a valuable ranch to which her husband held legal title. The Court dismissed her contribution of work and management, which was about the same as her husband's, as being what was expected of an ordinary ranch wife in any event. The fact

that she was as responsible as her husband for the value of the property did not give the Court any grounds for interfering with his legal title. When the law requires such results, then nothing could be more apparent than the fact that such law is no longer tolerable in a society that professes its laws to be both humane and just. We associate ourselves with the concept of equality before the law for married persons of both sexes and believe that it is the coherence and justice inherent in the concept of legal equality that gives the true substance to the argument that there is a need for significant change in the law governing family property relations.

In this paper we confine ourselves to unions in which the parties are legally married, to the exclusion of other relationships that resemble marriage in all respects except for the absence of the legal bond. There has been much written about the changing nature of the family, and it may well be that at some future time it will be necessary to consider the problems of persons who are "attached" but not married. Our present task, however, is limited to an exploration and analysis of the ways in which the traditional institution of marriage can be strengthened through changes in the law that are in most cases long overdue.

Marriage is an economic, emotional and cultural partnership. The family unit is the most important institution of our society. When the laws governing the relationships between married persons are examined—particularly those laws dealing with property—it is apparent that they are almost totally inadequate either in strengthening the foundations of the modern family or in ensuring the dignity and stature of each of the partners. Only one jurisdiction in Canada—the Province of Quebec—has undertaken any thorough reforms in its family property law during this century, and only two others—the Northwest Territories and British Columbia—have taken significant legislative steps in this direction. In the common law provinces and territories married persons are all subject to the regime of "separate property". The separate property system is also available in Quebec as an alternative to its newly created property regime which provides for a sharing of assets upon the termination of a marriage. Our concern in this working paper is to examine the basic deficiencies of this law of separate property, with emphasis upon the majority of those common law jurisdictions where it has not been modified and in which it has existed as a body of law, doctrine and dogma, essentially unchanged for almost one hundred years. Since we are dealing with a system that exists in every province and territory, with individual variations in each jurisdiction, our observations must necessarily be general rather than specific. But in this case we are of the view that generality is sufficient, on the simple ground that many essential concepts of the separate property tradition,

and the legal consequences for husbands, wives and children that follow from those concepts, are no longer acceptable in Canada today. Taken as a whole, as we shall take it, the regime of separate property today is unfair and inequitable because it fails to protect human values that have long since been recognized and secured in other areas of our law.

This, of course, has not always been the case. The separate property laws of the Victorians were well-suited to the conditions they were designed to meet. For their day, they accurately reflected the cultural preferences and economic realities of the society as it was found one hundred years ago. The laws of separate property only become bad laws when they are expected to accomplish things they were never designed to do, such as providing an adequate basis for the institution of marriage in a world that is different in an endless number of ways from the world that existed when those laws were originally formulated.

We feel constrained to emphasize that reform in this area of the law cannot be successful if it is conceived of as a need to impose a new philosophy upon people who, for better or for worse, have ordered their lives on the basis of the old. While tomorrow must be served, yesterday should be respected. Our aim is not to make divorce a more attractive prospect, but rather to strengthen existing marriages by proposing certain alterations in legal structures that we identify as harmful to this end, and to provide a legal framework that will enable Canadians to construct better marriages in the future.

This area of law affects many different persons in many different ways. Consequently, opinions will differ on the questions of what reforms are necessary or desirable, how they should be implemented and whom they should affect. We urge all persons to whose attention this working paper comes to express their views to the Commission. Such indications of opinion will be invaluable to us in the task of dealing with family law reform, and we emphasize that we welcome all opinions.

Property Law and Marriage

The law of separate property operates to assign ownership of property to the person who pays for it. If it were not essential in a family that one spouse provide primary care for children, this provision of the law would make very little difference to the respective property positions of married persons. Each could earn money and each could buy and own property. Indeed, this is one of the bases of the theory of separate property. A married man's earnings, and property purchased from those earnings belong to him, and his wife's earnings and property bought with her earnings belong to her. But for so long as children have a need for attention, affection and supervision, those spouses to whom the task of child care falls, and here we are referring almost exclusively to married women, will be effectively prevented from being able to obtain legal ownership of property in their own right. The law of separate property, with its doctrine of "what's his is his and what's hers is hers", provides formal equality. But when viewed against Canadian society today, this is obviously only a theoretical concession to equality based upon nineteenth century laissez-faire economics. The rhetoric of equality is there but not the reality.

The needs of children present an inevitable problem, where the division of function in marriage is concerned, that adversely affects the property position of married women. But there are also several relative problems that are no less compelling. Since the view of women as dependants and housekeepers has been almost an article of faith in Canada for so long, even the married woman with no responsibilities towards children may never have seen herself as, or been raised or educated with a view to being, a permanent member of the labour force. She may be psychologically unprepared for work outside the home, and even if not, and if she has the proper training and skills, she may be unable to find a job suited to her abilities at a salary that would attract a man of similar background. The lack of true economic opportunity for women in Canada—in the sense that men have true economic opportunity—is a notorious and unfortunate reality. This is in turn reflected in, and accounts in part for, the fact that many married women are in an inferior position to their husbands in the matter of ownership of property.

The possibility that married women will stop work in order to bear and raise children may furnish some explanation for the reluctance of many employers to train and promote them to positions of higher responsibilities and salaries. It may also account in part for the fact that important family purchases are often made in the husband's name. Since a woman's earning ability would be interrupted by the birth of a child, while her husband is expected to work continually for all of his adult life, it follows that sellers of property would prefer to deal with husbands and not wives. This is reinforced by legal provisions in most Canadian jurisdictions that make married women worse credit risks for sellers than single women, or men whether married or single.

As was pointed out by the Royal Commission on the Status of Women, there exists a strong cultural bias in Canada in favour of the stay-at-home wife that goes hand in glove with the legal dependency status of married women. And even if a wife overcomes this problem and takes a job, she may be discouraged in the pursuit of her own career by finding that the burden of housekeeping for herself and her husband still falls mainly upon her, since many men are neither trained nor psychologically prepared to assume these duties, having their own cultural biases to contend with.

None of these factors may be significant in some marriages. Yet in most marriages these things, in some combination or another, operate to ensure that more property is bought with the funds of husbands than wives. And following from this, the law of separate property ensures that when marriages end, husbands own more property than their wives. Such a fundamental economic imbalance is not, in our view, paralleled by any significant differences in the contributions that each spouse makes to a marriage. It is not necessary or desirable to attempt to approach the problem from the perspective of "how much is a housekeeper worth in relation to a chemical engineer?" or "what is the value of a wife's child-care services to a semi-skilled worker on an assembly line?". The fact is that in the great majority of marriages the spouses assume equivalent though different duties equally taxing to each and of equal importance to the family.

The law has traditionally interpreted "value" as meaning the price that services would command in terms of wages. We believe that where the family is concerned, the law should put behind it this narrow assumption that money is the single and exclusive measurement of value that is relevant in determining property rights between husband and wife. Instead, it should be concerned with the more fundamental question of the fairest way for equality in property matters between husbands and wives to be guaranteed by law, regardless of traditional or

market place inequalities, and regardless of the role assumed by either spouse in the accomplishment of functions necessary to the family. The law is capable of protecting human dignity and fostering equality between the sexes and not just a mere mechanical preservation of the more tangible forms of wealth known to our society. It is time that these finer capabilities of the law became its goal rather than its shame, with the emphasis shifted away from a sterile inquiry into who earned what and who bought what and into the more fruitful realm of ensuring that what is fair in the context of the family unit is what the law requires.

This goal cannot be achieved under the law of separate property as it now exists. The assumptions behind that law are out of step with the facts of twentieth century life and twentieth century community attitudes towards marriage. Its shortcomings are manifested during marriage primarily in a psychological sense. Many dependent married women do not own or have rights in much of the family property—they merely use it with the tacit permission of their husbands. The price a dependent married woman pays for being supported according to the means and lifestyle of her husband is not measured in terms of relative comfort. Rather, in spite of generally being raised to accept this as the natural order of things, the cost to the dependent married woman of the separate property system is paid in the coin of individuality, identity and self-esteem. When a marriage ends in divorce, as increasing numbers now do, these intangible deficiencies are transformed into harsh economic realities. A dependent wife may own at the time of divorce literally little more than the clothes on her back, regardless of how much property is held by her husband or what property was mutually used and enjoyed during the marriage.

We do not wish to be understood as characterizing marriage as being merely a business arrangement, because it obviously is far more than that. We are in full agreement with the position that there is more to marriage than property rights at the time of divorce. By the same token, however, there should be more to property rights at the time of divorce than a legal inquiry that ignores everything about the work that goes into a marriage other than work performed for wages.

Specific Problems with the Law of Separate Property

Some basic defects in the law of separate property can be illustrated by examples of how the courts are required to apply that law. If during the course of a marriage the husband works and the wife stays home with the children, on divorce the wife will not have any share in any of the property purchased from the husband's earnings. The assumption behind this result seems to be that since she has been supported for part of her life—that is, she has not had to do any work for wages—then the law should not give her any share in property that was purchased out of wages. The law of separate property does not have any means for measuring, in terms of property rights, the value to her husband, her family and society of her work as a housekeeper or mother.

A married man is required by law to provide his wife and family with the necessities of life: food, shelter, clothing. Since most employment occupies normal shopping hours, the task of making routine family purchases is usually undertaken by the wife, using money furnished by her husband. Everything she buys this way becomes her husband's property. If, through prudent management, the wife is able to save money out of her household allowance, such savings and any property purchased with them, belong to the husband. The law of separate property does not even go so far as to find that the spouses have a joint interest in savings from a household allowance.

If both spouses work, the law of separate property has no effective ways to treat the family as an economic unit. Rather, the courts are obliged to trace the ownership of property to the spouse who was the source of the funds with which it was purchased. This becomes most harmful where the earnings of one spouse have been used to pay for property while the earnings of the other have been used for consumables such as holidays, food, children's clothing and so on. Because of the limitations mentioned earlier on credit available to married women, and the less-certain continuity of married women's income, it is most often the husband's money that is used for charge account purchases, car payments, mortgage payments, and the like. It is legally immaterial to the question of who owns property that a wife's earnings have taken up enough of the slack in a family budget to allow a husband to be able to make payments on property. The law does not look at the whole

picture of the family finances in determining ownership, but only at whose money paid for each particular asset. This rule can work both ways, so that it is not always the wife who suffers the disadvantage. The point is not whether more wives or more husbands will take a loss in this situation, but rather that the spouse who produced sufficient additional income to allow the other to acquire property must take any loss at all.

If both spouses work and contribute to the purchase of property, other rules come into play that tend to make the determination of ownership somewhat fairer. Generally speaking, if each spouse contributes money to the purchase of an asset, each will have a share, either in proportion to the amount of money he or she put up, or, where the court finds the spouses intended to share equally, an equal share. In many cases where equal sharing has been ordered by a court, the evidence of intention to share equally is highly equivocal, since most married people tend to operate on the basis of unspoken understandings rather than formal arrangements made at the time property is purchased. There is a recent trend in modern Canadian law for the courts to find that married persons intended equal sharing once some financial contribution by both spouses to the purchase of property is proved, regardless of the inequality of the contributions. The courts say "equity is equality". In our view, this tendency towards equality represents an attempt by the courts to compensate for the inability of the traditional law of separate property to produce fair results in situations where a wife's time has been mainly taken up by caring for children and household management, with only temporary periods of employment.

In order to have any sharing, however, there must always be a direct financial contribution by both spouses to the acquisition of the property. No doctrine exists that the value of a contribution towards the family home, farm or business by way of management, physical labour, cooking, housekeeping, or child care is sufficient to give a spouse making such a contribution—and these are almost invariably wives—any share in the business, farm, home or property.

It is, of course, always possible for one spouse to make a gift of property to the other. This is the way in which a non-earning wife gets any claim to assets purchased out of her husband's income, and is the one area in which the law of separate property has recognized and to some degree compensated for the propertyless position of the dependent wife. If a husband buys property out of his earnings and takes the title in the joint names of himself and his wife, he is presumed in law to have intended to make a gift to her of one-half of the value of the

property. Similarly, if he buys property in her name, the law presumes that he has made a gift of the entire property to her. This is called the "presumption of advancement" and applies only in one direction: if a wife buys property from her earnings and takes the title in joint names or in her husband's name alone, the presumption is that she retains the full interest, and that he holds the property, or a share in it, as a trustee for her. This is the presumption of "resulting trust". Both presumptions can be rebutted by evidence showing that the intention of the purchaser was different from what is presumed, but in the absence of such evidence wives take property purchased by their husbands under these conditions as gifts, while they retain the full beneficial interest in property that they have purchased and placed in their husband's names.

These presumptions—particularly the presumption of resulting trust—have been recognized by the courts as sexually discriminatory and their force has been largely eroded in recent years. There may have been a time when it was recognized as unthinkable that a married woman would give property to her husband, but this was during an earlier age when husbands took most of their wives' property and earnings by operation of law. We think, today, that a rule such as that of resulting trust embodies a patronizing and unnecessarily protective attitude towards married women, and that better alternatives exist for the law to strike a balance between the property positions of husbands and wives.

It should be mentioned that neither the presumption of advancement nor of resulting trust ever applied in Quebec under the circumstances described above. Until quite recently, gifts between spouses were prohibited by law in that province.

Other and more overt instances of discrimination based upon sex exist in the law of separate property. As we have already pointed out, the laws of most provinces impose the obligation to maintain a dependent spouse only on the husband. However, the wife's right to be maintained by her husband or to pledge his credit for necessities is subject to a "morals test", whereby if she commits adultery or deserts her husband, she loses her rights. Adultery can also cost a wife her dower rights in those provinces where this right exists, can prevent her from taking a full share in the estate of her husband where he died without leaving a will, and can prevent her from receiving a share of his estate after his death if he made no provision or only an inadequate provision for her in his will. In general, no similar disqualifications are placed by law upon husbands after the deaths of wives. The law of separate property is, first and foremost, the law of the double standard.

There can be no doubt that this whole body of law, of which we have mentioned only a few examples, needs a thorough overhaul. The remainder of this working paper is devoted to a consideration of the directions in which meaningful reform might travel. The basic premise we have adopted is the need to put behind Canadian law, once and for all, invidious discrimination based upon sex and to found reforms on the principle of equality between husbands and wives. The law will, of course, still have to make distinctions—this is inseparable from the nature of law itself. Where this is necessary, however, distinctions should be made on the basis of the functions actually performed by a married person, according to the way the spouses have agreed to divide up the necessary duties of wage earning, child care, household management, and so on. It should no longer be presupposed by law that a certain role will fall to the husband and another to the wife. Following from this, the law should attach equal value to the duties within the marriage performed by each spouse, without putting the wage-earning spouse in a preferential position when ownership of property falls to be determined.

Although it is outside the scope of this working paper, it is clear that such a fundamental shift in the law of separate property should be accompanied by parallel reforms in all those other areas where differences in rights, obligations or opportunities exist, depending upon whether the person affected is a married man or a married woman.

Primary Approaches to Reform

There are three primary approaches from which to choose when significant reform to the present law of separate property is sought.

First, the law of separate property could be retained, but the courts could be given a discretionary power to transfer property from husband to wife or wife to husband at the time the marriage is terminated by judicial process.

Second, the law of separate property could be replaced by a system under which each spouse would have co-ownership of all property acquired by either spouse between the day the marriage began and the day it is terminated. The common property would be divided equally between the spouses at the end of the marriage.

Third, the law of separate property could be retained to the extent that property continues to be owned by each spouse separately during marriage, but when the marriage is terminated, the spouse who had acquired the lesser amount of property during marriage would have a right to equalization—that is, for example, at the time of divorce the court would order the spouse with the larger amount of property to transfer either money or property to the spouse with the lesser amount, thereby equalizing the position of the spouses.

In addition to major changes of the sorts just described, legislative attention should be directed toward some particular areas in which immediate improvement can and should be made. It is not necessary to create an entirely new alternative property regime in order to get rid of many of the instances of overt sexual discrimination that are found in the law of separate property. For example, a bill was introduced in Ontario in 1974 declaring that husbands and wives had “independent, separate and distinct” legal personalities and, in order to eliminate legal disqualifications imposed upon married women, it was provided that every married person has the same legal capacity as a single person. The purpose of these declaratory provisions is stated in the legislation as being:

to make the same law apply, and apply equally, to married men and married women and to remove any difference therein resulting from any common law rule or doctrine. . . .

This is, of course, only an initial step in the reform of the discriminatory inheritance from the law of separate property. In our view, however,

it is a good example of what can be done now, pending the completion of the far more difficult task of formulating fundamental alterations in, or a replacement for, the separate property system.

Another example of reform that could stand independently would be the creation of a special property regime for the matrimonial home and its contents. Such a regime could be superimposed upon the present law of separate property, or combined with any of the major alternatives to that law. Because the matrimonial home is usually the single most valuable property acquired during marriage, and because of its unique character as the shelter and centre for the family, we are of the view that special rules should apply to it and its furnishings. These rules should have the effect of giving both spouses, regardless of which one owns the home, an equal share in its value, and giving both an equal voice in major decisions affecting it: borrowing money using the matrimonial home as security, selling the home, and questions relating to its use and occupation. A similar general principle should apply to the furnishings of the home, so that they could not be removed by the spouse who owned them without the consent of the other, or otherwise dealt with as if they were ordinary items of property, unaffected by any overriding family interests.

It should be noted that the combinations of possible reforms extend far beyond the three primary approaches described above. A family property system can be tailored to meet virtually any set of individual, community and social interests a legislature is prepared to recognize or advance. The importance of this field of choice cannot be overstated—no area or individual rule of law prescribing property and financial relations between spouses, either as we have received it from the past or as this Commission has considered it might be changed, is graven on stone. Changes should be made whenever necessary to serve the interests of fairness and equality that are pressing for recognition in Canada today. We turn now to the principal approaches to reform.

The First Approach: Separation of Property with a Discretion in the Court

The basic principle of this approach is that the law of separate property would be retained, so that ownership of property would remain with the spouse who paid for it. Upon termination of the marriage pursuant to a court order, however, the court could exercise broad powers to order one spouse to transfer property to the other or to pay money in lieu thereof. The same power with respect to property would also be exercisable for the benefit of children of the marriage.

England, New Zealand, British Columbia and the Northwest Territories have all recently adopted property regimes of this sort. Our discussion will focus primarily on the English model, mainly because the new discretionary property laws in Canada have only been in operation for a very short period.

In England, discretionary powers of the sort described are exercisable by the court at the time of the granting of a decree of divorce, nullity or judicial separation, or any time thereafter. It is worth noting that the English courts consider the question of maintenance at the same time and according to the same criteria as the matter of a final property settlement between the spouses.

In Canada today, with the recent exception of British Columbia and the Northwest Territories, a court granting a divorce to spouses governed by the law of separate property has discretionary powers only with respect to maintenance; it has virtually no power to interfere with the title to property. In our view the family partnership cannot be wound up in a satisfactory manner so long as the courts are limited to maintenance in adjusting economic imbalances flowing from the marriage. This combination of poor economics and unwise social planning adds up to bad law—something emphasized by the fact that England has now repudiated some fundamental aspects of the system of family property laws that Canada and many other countries acquired from it.

The English courts are empowered to make orders for the maintenance of family dependents and may also order the transfer or settlement of property for the benefit of either spouse or the children of the family. The court is required to exercise these discretionary powers so as to place the parties, so far as practicable, and having regard to their conduct, in the financial position in which they would have been had the marriage not broken down. In addition to these general criteria, the court is required to have regard to the following circumstances:

- a. the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
- b. the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- c. the standard of living enjoyed by the family before the breakdown of the marriage;
- d. the age of each party to the marriage and the duration of the marriage;
- e. any physical or mental disability of either of the parties to the marriage;
- f. the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family; and
- g. in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

It is significant that the court considers the “income, earning capacity, property and other financial resources” of *each* of the spouses. While it is true that this statute does away with the tradition of unsailable vested property rights—a fact that is of greatest significance to husband-wage earners—it also, through focusing upon the financial means and abilities of each spouse, effectively cuts away at the folklore that marriage provides a lifetime economic shelter for women, regardless of their abilities to provide for themselves.

A second very significant feature of this law lies in its emphasis upon the contributions made by each of the parties to the welfare of the family “*including any contribution made by looking after the home or caring for the family*”. This amounts to a legislative recognition of the obvious fact that where there is a division of function in a marriage, as there generally is, those tasks of household management, child care and similar duties usually performed by wives should be of equivalent dignity and value in the eyes of the law as the provision of a financial contribution through paid employment outside the home. We are convinced that this is evolutionary rather than revolutionary, regardless of how heretical it may appear to those who prefer to keep traditional property concepts, and the effect that those concepts have upon human beings, in separate compartments. That it may even be debated seriously at this stage of the twentieth century is merely another illustration of how easily legal orthodoxy becomes a prison from which justice must ever try to escape.

The new direction taken in England does not mean that property rights between married persons are determined other than according to the principles of law. Rather, it means that where marriage is concerned, Parliament has determined that new and fairer principles of law shall govern.

We do not propose to go into detail respecting the distinctions and similarities among the new laws conferring discretionary powers over matrimonial property now in force in England, New Zealand, British Columbia and the Northwest Territories. The interested reader is referred to the study paper prepared by this Commission’s Family Law Project for a comparison and analysis. For present purposes it is sufficient to say that the new laws in each jurisdiction give the courts power to make property adjustments in the context of marriage that have heretofore been impossible under the conventional law of separate property.

A discretionary property regime, while simple in concept, raises difficulties of some magnitude, both in terms of general policy and concrete application in individual cases. Perhaps foremost among these

is the question of the effect that the conduct of the spouses should have upon their rights to property sharing. Two different approaches are reflected in the English and New Zealand statutes. New Zealand law provides that:

in determining the amount of the share or interest of the husband or the wife in any property or in the proceeds of the sale thereof, [the judge] shall not take into account any wrongful conduct of the husband or the wife which is not related to the acquisition of the property in dispute or to its extent or value.

Sexual misconduct, and such questions as whether a married person has been “a good husband”, “a wastrel”, or whether a spouse has succeeded in living up to the court’s view of what is expected of, for example, “an ordinary ranch wife”, are simply disregarded as irrelevant in property settlements between husbands and wives in New Zealand, unless the conduct in question is in some direct way related to the property that forms the subject matter of the court hearing. In England, on the other hand, when apportioning property between spouses the court is specifically directed to consider their conduct in a much broader sense. Matters such as adultery and guilt or blame for the termination of the marriage are thrown into the scales to be weighed against whatever value is attached to evidence of sobriety, being a good provider, successfully rearing children, and all of the other activities that comprise the history of a marriage. The English courts have not particularly welcomed the task of having to translate human strengths and weaknesses into property awards, and have therefore adopted, by means of judicial interpretation, the position that misconduct should not affect a property settlement between spouses unless it has been “both obvious and gross”.

Another potential disadvantage of a discretionary system lies in its lack of certainty or predictability. Many of the factors that must be taken into account in the exercise of discretion are highly subjective, and judges no less than others, differ in their subjective evaluations, and on questions of what values should be applied to what facts. If conduct of any sort is to have some effect in a discretionary property system—and this will almost certainly be the case—then it is inevitable that different judges will hold differing views on the consequences of certain conduct. A discretionary system therefore invites the practice of “judge-shopping” by lawyers—something that will always result in a disadvantage to one or the other of the parties and which tends to clog court calendars with frivolous motions and attempts to delay the due process of law. Again, because subjective judgments are required in such a system, cases that are apparently identical in their material aspects may be treated differently, thereby giving the appearance, if not the reality, of injustice.

Another drawback to a discretionary system lies in its lack of fixed legal rights. Even were equality to be stated as a general legislative policy, the essential nature of judicial discretion would leave the court free to make whatever sort of property disposition seemed to be appropriate in any given case. A married person would not have a *right* to equality, but only a *hope* to obtain it. If no concept of equality were contained in the law establishing a discretionary system, then it would be accurate to say that a married person would have no property rights at all at the time of divorce. Our concern here is not limited to the way things would work out in practice, since the courts would do their best to ensure that arbitrary dispossession did not occur. Rather, it includes the psychological advantage that accrues to a person who knows he or she has a positive right that is guaranteed and protected by law.

It must be assumed that if the legislature does not write the law in terms of fixed rights, the courts will eventually work out a series of "ground rules" for their own guidance as to how discretion should properly be exercised in different classes of cases. Until such matters of judicial policy were settled, the uncertainty that would lie over this area of the law would tend to make married persons turn to the courts for resolution of disputed property questions. Once the general policy was hammered out over a series of decisions, which could take years, the spouses' lawyers would be able to advise their clients as to how their affairs would be settled in court and could come to property agreements on that basis. Until such time, however, the system would tend to attract litigation. Further, the burden of litigating would, in our view, fall most heavily upon the non-owner spouses, since they would be placed in the position of having to establish generally unprecedented claims upon property owned by another.

The greatest advantage of a discretionary property system lies in the fact that this would be the easiest system for any separate property jurisdiction to adopt. This system would not be legally radical, however it may be characterized in social or economic terms, nor would it require any substantial re-ordering of affairs by married persons.

Such a system would also be the most flexible of the three primary approaches discussed in this working paper. Since we favour the principle of equality, we view flexibility as being of importance not as a means for encouraging the courts to depart from approximately equal sharing upon divorce, but rather as a device to allow the courts to deal fairly with the difficult problems that will arise during a transition period following the introduction not only of new property rules but also new maintenance concepts and other readjustments within the family economic structure.

A discretionary property system, as opposed to a “fixed-rules” system, would probably be the most difficult regime under which to unfairly avoid sharing. Where fixed rules exist, it may be possible for a married person, by careful manipulation of those rules, to so arrange his or her affairs as to avoid sharing property with a spouse. Fixed rules tend to attract the letter of the law, while discretion brings forth its spirit.

Making proper provision for children may also be easier under a discretionary system than under a system of fixed rules. Under any sort of property-sharing regime, it should be possible for the court to order a property settlement or disposition for the benefit of a child of the marriage. What is in the best interests of any particular child is a unique question of fact, not of law, and it would be very difficult to devise a legislative formula for dealing with such a question that did not involve a large measure of judicial discretion. If discretion is exercised in favour of a child, thereby affecting the property position of one or both parents, then it follows that fairer results would be more easily attained if the court had a discretion to ensure that what is done for a child does not result in a heavier burden on one parent than the other.

A discretionary property system would not need to contain any rules that would classify some property as sharable and other property as non-sharable. The court would be free to examine the whole economic picture of the family rather than being confined, for example, to dealing solely with assets acquired during marriage. On this point, while it may be a reasonable legislative policy to say that sharing should only apply to property acquired after marriage, there may be certain cases where such a fixed rule would not be appropriate. A discretionary system could simply leave the question open as to what property was sharable, leaving it up to the court to ensure that justice is done in any special case.

The Second Approach: Community of Property

The community property concept of marital property rights is based upon the assumption that marriage, among other things, is an economic partnership. As such, the partnership, or community, owns the respective talents and efforts of each of the spouses. Whatever is acquired as a result of their talents and efforts is shared by and belongs to both of them equally, as *community property*.

Community property regimes exist in Quebec, in many European countries and in eight of the United States. Quebec’s community

property regime, like the separate property regime in that province, is an option available to married persons who choose not to be governed by the basic regime providing for separate ownership of property during a marriage, with fixed sharing upon divorce.

The essential idea of community of property is very simple: the earnings, and property purchased with the earnings, of either spouse become community property in which each spouse has a present equal legal interest. Where the community is terminated—for example by divorce—the community property, after payment of community debts, is divided equally between the spouses. The community is also terminated by the death of a spouse, and in some jurisdictions, including Quebec, by an agreement between the spouses to switch to some other regime or to regulate their property relations by a contract. This simple formula conceals some rather complex rules. We can do no more in this paper than touch upon the general principles and a few of the major problem areas involved in community property systems without dealing with finer points in any great detail.

Under community regimes, there are three kinds of property: the separate property of the husband, the separate property of the wife, and community property. Typically, the property owned by either spouse before marriage is the separate property of that spouse, along with property acquired after marriage by a spouse by way of gift or inheritance. Separate property is not shared at the time of divorce, but rather is retained by the owner-spouse. All other property, however acquired, becomes community property, in which each spouse has a present interest as soon as it is purchased or obtained, and an equal share in its division upon divorce. In some jurisdictions, someone giving property to a married person must specify that the property is to be the separate property of the recipient. Otherwise it will be treated as a gift to both spouses, even though it is only given to one, and will become community property. In the Province of Quebec, some types of property owned before marriage become community property, but it is possible for persons giving such types of property to a single person to make the gift on the condition that it remain the separate property of the recipient should he or she thereafter marry under the regime of community property.

Under a community property regime, all property owned by either spouse at the time of a divorce is generally presumed in law to be community property unless it can be proved to be separate. In many marriages the spouses will not have adequate records of ownership or the source of funds used to acquire property. This produces the legal phenomenon of “commingling”—that is, the separate property of each

spouse eventually becomes mixed with that of the other spouse and with the community property, resulting in all the property being treated as sharable community property at the time of divorce. Commingling makes it impossible for the spouses to establish that certain items of property were owned before marriage, or otherwise fall into the classification of separate property.

Community property regimes, however, are enacted into law on the assumption that commingling is not what most people desire, and they therefore contain rather elaborate rules and formulae designed to deal with the fact that married persons will be using and enjoying the three different types of property created by the law of this regime—that is, the husband's separate property, the wife's separate property and the community property. These rules and formulae tend to make the essentially simple concept of community of property a rather complicated system in practice. For example, one typical rule is that property acquired after marriage in replacement of separate property does not become community property. This means that a spouse who wishes to replace or keep replacing property that was owned before marriage must keep an account and record of every transaction, so that at the time of divorce items purchased after marriage for which separate property status is claimed can be traced back to the original property owned before marriage, and can be shown to be replacements for such original property. If a person does not have adequate records, the replacement property will be presumed to belong to the community and shared between the spouses when the marriage is dissolved.

Even assuming that the separate property of a spouse can in fact be kept identifiable, it is necessary to have rules governing the situation where community funds are expended with respect to such property. If, for example, a husband owns a house as separate property and has it repaired, using community funds, the community property is entitled to reimbursement at the time of divorce to the extent of the value of the repairs. Or if he sells the house and buys another, using for the purchase some community funds plus proceeds of the sale, the rule might be that if more than fifty percent of the price of the second house came from the first house, it remains separate property subject to an appropriate compensation to the community upon divorce. If more than fifty percent of the price of the second house came from community funds, then it loses its character as separate property and becomes community property. In the latter case there would be a compensation paid from the community at the time of divorce to the husband's separate property equal to the amount realized on the sale of the first house. When it is recognized that most families only have available the earnings of one spouse, which belong to the community,

and that many items of separate property over the course of a marriage would be maintained and repaired out of these earnings, or sold and "traded up" for newer property using the proceeds of the sale of the separate property plus community funds, then some of the practical difficulties in accounting during the marriage and sorting out community and separate property at its termination become readily apparent.

In some community property jurisdictions, the income produced by a spouse's separate property (such as the profits from renting an apartment house owned separately by one spouse) becomes community property. In other jurisdictions, the rule is the other way, so that a spouse is entitled to keep such income separate so long, of course, as he is able to establish at the time of divorce that the source of the income was his separate property.

With respect to liability for indebtedness, some community property jurisdictions distinguish between debts contracted as community obligations, such as necessities for any member of the family or the debts connected with the prosecution of a community business, and debts contracted with respect to the acquisition or disposition of separate property or the management of a separately owned business of one spouse. In other jurisdictions, the community property is liable for the debts of the husband but not the debts of his wife. To give an example of how this matter is dealt with in the Province of Quebec, the question of whether the liability for a debt falls upon the separate property of the husband, the community property, the separate property of the wife, or some combination thereof, depends upon whether the debt was contracted by the husband, or by the wife on her own account, or by the wife as an agent for her husband, or by the wife without her husband's opposition, or by the wife with her husband's opposition, or by a wife who carries on a trade or calling with her husband's consent, or a trade or calling without her husband's consent, or whether the debt was jointly contracted by both spouses. The rights of the person to whom the money is owed may vary significantly according to the classification into which the debt falls. We do not set these matters out in order to pursue the rules and exceptions that apply to each category of debt but rather to make the point, if at some length, that the basic fairness inherent in a community property regime must be purchased at the cost of a fairly elaborate structure of legal rules that affect not only the spouses, but also all persons with whom they deal. It must also be remembered that the property available to answer for the various classes of debts does not always come neatly wrapped and packaged as "community property", "husband's separate property", or "wife's separate property", since commingling may have occurred or compensation with respect to a given item of property of one classification

may be owing from it to another classification of property—such as where an item of separate property has been improved using community funds. In all of this, the outside creditors may be somewhat at the mercy of the accuracy with which the spouses have kept their records.

Once it is conceded that fairness requires the existence of separate property as well as common property in a community property regime—and these categories are present in all such regimes—then it must also be conceded that detailed rules are essential in order to ensure that the common property of husbands and wives is not diminished or impaired by the debts of either of them unconnected to the marital relationship, and that it is equally essential to ensure that those who provide services, sell goods or extend credit to married persons are not deprived of a just recovery when the debtor has the means of satisfying the debt. These are not abstract legalistic problems, but matters that would be of immediate concern in a province or territory seriously considering a change from separate to community property. Married people are constantly entering into contractual relationships involving the creation of debts, and the adoption of a community property regime would invariably have a profound effect upon the mechanics of the economic life of a jurisdiction making such a change. The policy decision to be made here is whether the added complexities are balanced by the additional social benefits that would be brought by the creation of present property interests in both marriage partners.

Questions similar to the matter of liability for debts also arise under community property systems in relation to community liability for torts or delicts—that is, for injuries—inflicted by a married person upon a third party. Under the rules of community property jurisdictions the separate property of a spouse committing a tort is usually available to answer for injuries done to others. In this connection, however, it should be borne in mind that in most cases married couples will not have extensive separate property holdings. Their main, and in some cases only, asset will be their community property, and the issue arises as to the liability that should fall upon this mutually owned property as a result of a wrongful act of only one spouse.

It is good public policy to provide for the redress of victims of tortious acts by making it possible for them to collect their judgments. On the other hand, there is also a strong public interest in protecting the rights of the innocent spouse—that is, the one who did not commit the tort—by ensuring that such a spouse is not deprived of community property because of the wrongful act of his or her partner. In some jurisdictions, the community property is available to satisfy tort judgments against the husband but not against the wife. In others, the com-

munity property is liable to satisfy a judgment for the tortious conduct of either spouse—an approach that favours the victim of the tort over the innocent spouse. In other jurisdictions, the community is liable for judgments only if the tort was committed during the prosecution of the “community business” and not if one of the spouses has committed a tort that has nothing to do with the marriage. A fourth alternative makes half the community available to the judgment creditors of a tortfeasor spouse.

Again, as with what was said before about debts, if a previously separate property jurisdiction were to decide to adopt the community property regime, it would be required to make a careful analysis of these problems, in the effort to come up with a statutory scheme that clearly identified and gave the best accommodation to the conflicting policy interests.

Community of property contains a built-in potential for disputes because it involves one mass of common property in which two persons have an interest. The traditional solution to this problem has been for the law to designate the husband as “manager of the community”. This approaches the problem of resolving conflicting interests between the spouses by simply defining it out of existence. It does nothing, however, to protect the position of a married woman whose husband dissipates or wastes the community property—which, by law, is hers as well as his—through neglect, mismanagement, or plain stupidity. At best, the husband-as-manager concept is a concession to the fact that in most cases the bulk of the community assets will have been accumulated out of his earnings. Such an arrangement, however, also bears the earmarks of sexually based discrimination, which is no more acceptable under a community of property regime than it is in a different context, under the law of separate property. The single-manager rule has been modified in most jurisdictions by provisions such as requiring the consent of both spouses before a gift of community property can be made or before disposition of community real property. As a matter of policy, however, we agree with the movement now under way in many of the American community property jurisdictions to revise the rules of management by substituting for the traditional form a concept of joint management. What this generally means is that either one of the spouses can manage all the community property, subject to the provision that in certain important transactions, usually involving real estate or large assets, the decision has to be joint.

Regardless of how the management rules are framed in a community property system, it is apparent that disputes will arise between spouses that must be settled in a way that protects the legal rights of

each. All such systems therefore provide mechanisms for application to the courts in situations where one spouse is alleged to have unreasonably withheld consent to a transaction that cannot take place without agreement between the partners, or where mismanagement of community assets is alleged or where the interests of one spouse are jeopardized by the fraudulent or improvident acts of the other. Many people who are accustomed to the separate property tradition will see this as an unwarranted intrusion by the state into the privacy and autonomy of the family. Those concerned with the administration and operation of the courts may see this as placing a strain upon already overworked judicial resources, as well as asking the courts to deal with problems that in many cases are more social than legal in their nature. In addition, of course, court applications are cumbersome and expensive.

Against these objections it must be said that such a use of the courts is contrary to the tradition of a separate property jurisdiction mainly because the law of separate property has been content to leave a non-owner spouse without any significant rights to be protected. This rule that "the King's writ does not intrude" into the home in separate property jurisdictions has a rhetorical nobility that cannot be denied, and was undoubtedly framed because of the honest conviction that court intervention in ordinary domestic affairs was an improper judicial function. Yet such intervention can only be considered legally improper for so long as the law, for better or for worse, subjects one spouse to the whims of the other, rather than granting equivalent legal rights and legal dignity to each. Regardless of what system eventually replaces separate property as it now exists—and we view such a replacement as both inevitable and desirable—the creation of new rights will require a means for their vindication. The fact that more court time will likely be consumed in interspousal dispute resolution under community property than under the other alternatives to the present law is only a valid objection to the adoption of a community system and not to the adoption of some new and fairer form of property law in lieu of separate property. Whatever new directions may be taken in the jurisdictions that now have traditional separation of property, the procedures of the courts and the very concept of the judicial role will have to be adapted to the coming Canadian reality of true legal equality between husbands and wives.

Community of property has many ramifications with which space has not allowed us to deal. A change from separate property to community of property would require the rethinking and modification not only of most provincial and territorial family laws but also the laws dealing with wills and intestate succession, gifts, pensions, commercial law, insurance law, the ownership or rental of property, including the

matrimonial home, and the registration of interests in land. Of the three major approaches discussed in this working paper, community of property would involve the most wide-ranging and radical changes in the economic and social fabric of a jurisdiction in which it was adopted. Community of property creates a whole new context and a whole new set of problems, not only for spouses, but also for anyone entering into transactions with a married person. It involves complexities of identification of ownership and tracing of funds and assets over a broad range of activities where no such requirements now exist under the law of separate property. While these problems are by no means insurmountable, and have been solved in a number of different ways, they have to be taken into account in considering the desirability of adopting the system.

Further, where the community property system exists in a federal setting such as Canada, additional problems of conflict of laws immediately are posed. Since the population of this country is highly mobile, with people constantly moving from one province to another, many questions will arise as to whether a situation involving such matters as property issues between spouses, inheritance rights or the position of creditors is governed by the law of community property or the law of separate property. Many of the conflict of laws rules are reasonably satisfactory, having been worked out in the past because of the existence of a community property regime in Quebec. But there are still many gaps in the present scheme of rules, and some of them are quite unsophisticated. In our view, if community property systems were adopted by several other provinces, the general body of rules for dealing with such situations would be clearly inadequate and much litigation would be required to deal with novel or unanticipated cases.

Because of its many unique features, we believe that a community property regime would also create the most litigation of the three alternatives with which we deal. Like the discretionary system already described, there would be a certain amount of judicial activity called for during the first years of operation of a community system, if for no other reason than that it is impossible to expect that any legislation, no matter how carefully thought out, could correctly anticipate all the tests to which it would be put in resolving property issues between spouses. Unlike the discretionary system, however, community of property will directly affect the interests of many persons besides married couples, and such persons can be expected to turn to the courts where they feel their interests are adversely or unfairly affected by the new regime, or where the laws are incomplete or unclear.

The question whether the system of community of property is sufficiently superior to a discretionary regime, or to the deferred-sharing

system we describe in the next part of this working paper, involves complex policy decisions. Fundamentally, however, we see it as a choice between two things. On one hand there is the benefit to the spouses of their common ownership. This benefit not only makes a reality out of the concept of partnership, which we think strengthens the institution of marriage, but also carries with it the emotional and psychological benefits derived from the reality of present ownership for the spouse who is not gainfully employed outside the home. Against this is the fact that the adoption of community of property, in the context of a jurisdiction that has always had separation of property, would be a radical alteration of existing customs, practices and traditions, involving the necessity of new, complex rules being learned and employed in daily affairs not only by married couples, but also by those dealing with them.

The Third Approach: Deferred Sharing

Deferred sharing, or deferred community of property as it is sometimes called, is based on the idea that there should be separate ownership of property during marriage, and an equal distribution of property on divorce. Deferred sharing, therefore, lies somewhere between the extremes of separate property on the one hand and full community of property on the other. Deferred sharing regimes exist in Denmark, Sweden, Norway, Finland, West Germany and Holland. In Canada, Quebec adopted a deferred sharing regime in 1970—the “partnership of acquests”—as its basic family property law, applicable to all married persons who did not make a positive choice of community property or separate property. In addition, the Ontario Law Reform Commission, in the spring of 1974, made a formal and detailed proposal to the government of that province that legislation be enacted to create a deferred sharing system, known as the “matrimonial property regime”, to replace many fundamental aspects of the law of separate property in Ontario. Although there are some conceptual differences, its results are essentially similar to Quebec’s partnership of acquests.

The basic theory of the deferred sharing system is simple. In general terms, all property acquired by either spouse during marriage is to be shared equally when the marriage partnership is dissolved. There are some exceptions to this rule which we will deal with below. In describing how this sharing plan would operate we will use the model of deferred sharing developed by the Ontario Law Reform Commission, which was consciously designed with a view to being adopted in, and solving the problems of change in a province with a separate property regime.

The deferred sharing system proposed in Ontario is obviously aimed at the unsatisfactory state of the present law of separate property as it affects persons at the time of divorce. It was recommended, however, that divorce not be the only occasion for termination of the regime. Equalization of the marriage assets would also occur upon the death of a spouse, on a joint application to the court by the spouses for the winding-up of the regime, or on an application to the court by only one spouse where normal cohabitation had ended, where the applicant's legitimate expectations in the sharable values of assets were jeopardized by the actions of the other spouse, or where a spouse had sold or granted security over the matrimonial home without the consent of the other. Equalization could also occur in proceedings for a declaration of status having the effect of determining that the marriage did not exist. In other words, although the primary concern is with divorce, it would not always be necessary for the spouses to be divorced in order to have sharing.

The theory of deferred sharing is that marriage is an economic as well as a social partnership. At present, most people being married in a separate property jurisdiction are aware of the necessity to devote their energies to succeeding as social partners, but make the assumption that the law, whatever it may be, ensures that the economic aspects of their relationship will somehow be dealt with in a just and equitable fashion. It is usually not until the social partnership breaks down, and divorce proceedings are instituted, that married persons realize that the concept of economic partnership—which in our view is a basic understanding between a majority of married Canadian couples—is not recognized by the law of separate property. Any reliance upon the law to terminate the economic relationship between the spouses in a way that is consistent with the understandings that existed during the marriage is misplaced and mistaken.

Deferred sharing is primarily designed to intervene at this stage of a marriage; that is, when the marital relationship has deteriorated to the point that the spouses must stand upon their legal rights rather than upon economic arrangements made on the basis of mutual trust and respect. Until this point is reached, both spouses, under the deferred sharing system, are separate as to property. Each is free, with some exceptions designed to protect the interests of the other, to own, buy, sell, and otherwise deal with his or her property as he or she sees fit. However, when a divorce or any other situation arises under which the property regime would be terminated, both are entitled to an equal participation in the economic gains of the marriage, without regard to such matters as which spouse was employed outside the home, or who put up the money to acquire any particular asset. A deferred sharing

regime can therefore be said to conduce to two things: the autonomy of each spouse during the marriage and the equality of each spouse at its termination.

The basic complexity of a deferred sharing system lies in the formula for determining the “total financial product of the marriage”—that is, the value that is to be shared equally between the spouses upon the occasion, for example, of a divorce. What must be done is to ascertain the value of the property owned by each spouse at the time of divorce. Each then subtracts current debts. Also subtracted is the value of property owned before the marriage, and the value of property acquired during the marriage by inheritance or gift from a third party. What is left is the net value of the property that each spouse amassed during the marriage. The husband’s net gains are added to those of the wife, and each is entitled to one-half the total. In practical terms, this means that the spouse with the larger net gain during the marriage will pay an “equalizing claim” to the spouse with the smaller net gain, thereby equalizing the financial position of each.

The Ontario proposal does not create any classes of property that are exempt from sharing, such as “husband’s separate property owned before marriage” or “wife’s separate property inherited during marriage”, nor does it create, in an analogy to community property, any class of “potentially sharable property”. All property of a spouse is his or her separate property at all times. What the proposed regime deals in is *property values*. At the time of termination of the regime, the value of all property owned by either spouse would be presumed to be sharable until the contrary were shown.

A key proposal in the Ontario system is that all capital gains to, and income from property the value of which is deductible (for example, property owned before marriage) would become sharable. On the other hand, any diminution in the value of deductible property would reduce the amount of the deduction. This avoids most of the tracing of funds and property that creates such complexity with respect to separate property under a community property regime. Some record-keeping would still be required, since a spouse would have to show that the value of deductible property had been preserved in order to subtract that amount from his or her net worth at the time of sharing. Generally speaking, however, the Ontario deferred sharing proposal is much simpler in this respect than a community property system.

The debts and tort liabilities of each spouse would continue to be the separate responsibility of the married person incurring the debt or committing the tort. This represents no legal change affecting third party creditors, who would be in the same position under the Ontario deferred sharing regime as they are now. The impact upon the economic

picture in the province would be further minimized by a recommendation to the effect that a spouse's creditors rank ahead of an equalizing claim. Tradesmen, retailers and others dealing with married people would therefore incur no greater risk of non-payment under the Ontario deferred sharing system than they now do under the law of separate property.

A deferred sharing regime would require that some controls be placed upon the making of gifts by a spouse to third parties that are other than customary or usual, and upon sham sales or the creation of certain types of trusts—all of which would have the effect of jeopardizing the interests of the other spouse should the regime thereafter be terminated. Apart from these controls, no special need to resort to the courts for intervention in a family's domestic economic affairs is created by the deferred sharing system.

It was proposed that a court supervising the termination of the regime should be granted no general discretion to depart from the principle of equal sharing. A fairly narrow power of this sort was recommended where in special situations the unmodified application of rules created to conduce to autonomy during marriage and equality at its termination would "lead to grossly inequitable results". It should be noted, however, that the Ontario Law Reform Commission was firm in stating "matrimonial fault" should have no effect upon the right of a spouse to equal sharing at the time the regime was wound up.

No special exception from sharing was recommended in the Ontario proposal with respect to business assets. If such assets come into being during a marriage, their value would be shared in the same way as any other property values. It was suggested, however, with particular attention to the possible financial embarrassment of a business, that a spouse who owed an equalizing claim should have the ability to pay the claim, with interest, in instalments over a period of up to ten years, subject to the provision of an adequate security.

A deferred sharing system, although it does not approach the community property system in this respect, is complex in detail and, like the other alternatives discussed in this working paper, has ramifications in other areas besides property rights between husband and wife. A province adopting such a system would need to re-examine, among other things, some aspects of the laws respecting insurance, pensions, distribution of estates upon intestacy, interspousal maintenance, maintenance of children and conflict of laws. Federal action, particularly in the area of taxation, would also be required. The impact, however, of a deferred sharing system upon the commercial laws and practices that now exist under the law of separate property, and upon

most other community customs and usages, would be in no way comparable to the re-ordering that would be required by the adoption of a community of property regime. In addition, because the spouses would be separate as to property until a divorce or the regime was otherwise terminated, neither married persons nor those dealing with them would be required to master any substantial new body of doctrine and rules in order to function successfully under the new regime.

Although it is difficult to forecast such matters with any high degree of accuracy, we conclude that a deferred sharing system would create less litigation than the other approaches we have discussed.

Deferred sharing has at least two aspects that some may consider to be serious drawbacks. Like the discretionary system, it does not give the spouses a present equal property interest in the financial gains of the marriage. It has the advantage over the discretionary system of conferring rights rather than subjecting a non-owner spouse to the views of a particular judge at the time of divorce, but these rights are, as is implied by the title of the regime, deferred. While the psychological and practical value of present ownership that exists under a community property regime creates its own unique set of difficulties, it is also a value that should not be minimized. Here, as elsewhere, the deferred sharing system, with its postponed rights, represents a compromise between a system that depends entirely on judicial discretion and the present vested rights that would exist under a community property system.

The second possible objectionable feature of the deferred sharing regime is also shared with the discretionary regime. It assumes the continuation of the separate property system. The right to equality, however, that is the backbone of the deferred sharing regime, is fundamentally inconsistent with virtually every major abuse that exists under the present law of separate property. The monolithic concept of legal and practical inequality between the sexes found under separate property is philosophically undermined by the deferred sharing system. In recognition of this fact, the Ontario Law Reform Commission found that it was not possible to create reforms to the law respecting a right to equal participation in the financial gains of a marriage without also recommending substantial changes in many other basic tenets associated with the law of separate property. Major modifications of that law were accordingly proposed conducing to equality in maintenance obligations between husbands and wives towards each other and children; equal rights in joint bank accounts and common funds; equal rights with respect to transfers of property between spouses; equal rights in household allowances; and equal rights in the matrimonial home. The

repeal of many other sexually discriminatory laws, some affecting both spouses, but most discriminating primarily against married women, was also recommended.

Employing the law of separate property as the basis for a deferred sharing regime is therefore only a drawback to the extent that a legislature tolerates the retention of its philosophical tradition of sexual inequality. If the individual autonomy that is possible under the law of separate property can be achieved without sexually-based invidious discrimination, then we see no objection to the retention of this body of law, as reformed, as the basis for a redistribution of property rights between married persons under a deferred sharing regime.

Some Basic Policy Issues

There are several difficult policy issues that must be considered by any jurisdiction examining the creation of some form of property sharing law in place of a separate property regime. The first of these is the question of whether marital misconduct should affect the right of a married person to share in the division of property.

Marital Misconduct and Property Sharing

Marital misconduct is a moral issue with which the law has attempted, with varying success, to come to grips in the past. Humility in the face of such a difficult issue is a moral virtue that the law has yet to practice. The causes or sources of conduct by married persons that the courts are required to characterize as “guilty” or “blame-worthy” are recognized by the behavioural sciences as being far less susceptible of black and white identification than the law now assumes. Nothing short of a lengthy and candid psychiatric evaluation of the whole history of the relationship between a married couple would be capable of ensuring that real justice would be done in a system that viewed moral questions as being determinative in property settlements. And most divorce hearings are neither lengthy nor candid; nor are the tools with which the courts are equipped sophisticated enough to resolve such issues with the certainty that, in our opinion, is required in cases where significant property rights are at stake, and where the outcome will often represent the fruits of the labour of the spouses’ adult lifetimes.

Misconduct may be the legal reason for the termination of a marriage, but it does not necessarily follow from this that it should also be the reason for inflicting economic sanctions upon one of the parties. Like the quality of affection between spouses, the moral conduct of married persons is not something that can be purchased. Nor do we think it is a particularly appropriate task of the law to attempt to enforce an official moral code against married people through the power of the court to reward propriety or punish misconduct by the granting or withholding of property rights. While we admire the efforts made by the English and New Zealand Parliaments and courts to deal with a question that is both significant and profound, we do not think that

they should be emulated in this country. We accordingly suggest that the wisest course of action would be to introduce legislation to expressly exclude misconduct as a consideration in a property settlement hearing.

Sharing Business Assets

Another difficult problem—and one that arises under any property sharing regime, whether discretionary or fixed—is whether the business assets of one spouse should always be shared with the other, or whether the sharing should be confined to the so-called “family property”—that is, the matrimonial home, its furnishings, and other assets that have been jointly enjoyed by both spouses. One rationale for property sharing is that the spouses, each making different sorts of contributions to the marriage, both participate in the acquisition and building up of assets acquired during marriage. Where part of those assets are the assets of the business (or profession) of one spouse, however, the assumption that the other had anything to do with their acquisition or increase may be demonstrably untrue. While we recognize that the foregoing considerations are not without weight, we are nevertheless of the view that these assets should be shared, although some legal adjustments may be required to cushion the effect of such sharing in certain situations.

Marriage is an economic venture for both spouses, regardless of whether only one engages in the activity that produces the assets that are the tangible results of the venture. The life-fortunes, whether good or bad, of each spouse are inextricably bound together. A non-earning spouse—say a wife who is home caring for children—commits her economic destiny to that of her husband no less irrevocably when he is a businessman than when he is a wage earner. The risk of a business failure affects one spouse as much as the other and, in our opinion, the benefits of a business success are not fairly susceptible to a narrower allocation than the risks taken in the pursuit of such success.

We do not subscribe to the view that the spouse in a marriage whose role is non-entrepreneurial is, or should be allowed in law to be, merely “along for the ride”. This is a dependency-related concept that we think is no longer tenable. Getting rid of this concept is not a matter of the reform of property law, but rather of interspousal maintenance obligations, whereby equivalent legal responsibilities towards each other would be borne by both spouses. It may therefore be anticipating to some extent a rationality in the broader areas of family law that does not now exist to suggest that, in property matters, no distinction should be drawn among assets acquired as a result of business activities, assets acquired out of ordinary wages, and assets that can be classified as “family property”. Nevertheless, we feel that this should be a fundamen-

tal policy in any general reform of family law, and would therefore be appropriate to adopt in this particular area of law relating to property sharing between spouses.

Retroactivity

A third problem that must be faced by a jurisdiction adopting a property sharing regime is the question of retroactivity—that is, whether a new system should apply to persons now married as well as to people married after reform legislation takes effect.

It can be argued that it would be wrong for the law to interfere with vested property rights, and that persons who were married under the law of separate property should not be covered by any new system unless they choose to be. This appears to be the reasoning behind the proposal of the Ontario Law Reform Commission to the effect that persons who were already married when the deferred sharing regime comes into existence should have the choice of opting into the new system, or remaining separate as to property.

It should be noted that none of the four separate property jurisdictions which have recently granted their courts discretionary powers with respect to property issues between spouses (British Columbia, the Northwest Territories, New Zealand and England) made any exceptions exempting persons who were married when the new laws came into force from the operation of those laws. To this extent, these new laws can be said to be retroactive.

It is arguable, however, that the community of property and the deferred sharing alternatives, being changes of a more fundamental sort, should not be introduced without some choice being available to individuals already married as to whether the new regime will apply to them, or whether they will remain separate as to property.

In this matter we are inclined to agree with the Ontario Law Reform Commission, subject to one major difference. In our view it would be preferable for a community property or deferred sharing regime to apply to all persons who were married when the legislation came into force unless they chose to opt out, rather than requiring persons who were already married to opt in. This view, we should add, accords with what we are informed has been the opinion of a majority of persons attending a series of public meetings sponsored by the Attorney General of Ontario on the proposals of the Ontario Law Reform Commission, as well as being the position adopted by a majority of delegates at a major conference on family law sponsored by the Ontario Status of Women Council in October, 1974.

We also agree with the position taken in the four jurisdictions that have chosen to give the court the discretionary power to make orders transferring property from one spouse to another rather than giving each spouse definite property rights. Speaking with particular reference to divorce, it is our view that, in a jurisdiction where community property or deferred sharing is not available to married persons, the court should be able to exercise these sorts of discretionary powers in every case, regardless of whether the spouses were married before the date that the courts received authority to make such orders, and were given no options as to whether such powers would apply to their property relations.

Equality

The creation of a property-sharing system raises the question whether it should be intended to do nothing more than give a non-earning spouse *some* share in property, or whether the goal should be to equalize the property positions of each spouse on termination of a marriage.

Equality is the basis of a community property system, as well as a deferred sharing regime. Although both these types of regimes typically give the court some leeway in special cases to depart from equal sharing, it is only a discretionary system that leaves the matter of equality entirely open. In none of the discretionary regimes that we have mentioned in this working paper is equalization of property stated to be an object of legislative policy. An Appellate Court in England has described the judicial approach being taken under that country's discretionary system in the following terms:

If we were only concerned with the capital assets of the family, and particularly with the matrimonial home, it would be tempting to divide them half and half, as the judge did. That would be fair enough if the wife afterwards went her own way, making no further demands on the husband. It would be simply a division of the assets of the partnership. That may come in the future. But at present few wives are content with a share of the capital assets. Most wives want their former husband to make periodical payments as well to support them; because, after the divorce, he will be earning far more than she; and she can only keep up her standard of living with his help. He also has to make payments for the children out of his earnings, even if they are with her. In view of these calls on his future earnings, we do not think she can have both—half the capital assets, and half the earnings.

In our view, equality in matters of property is an appropriate goal to aim at under a discretionary system, or under any property-sharing system for that matter. As the above-quoted words show, however, there is an element of inequality arising out of the fact that,

notwithstanding a property division at the time of divorce, "most wives want their former husband to make periodical payments as well to support them . . .". If the expectations of most husbands will require some significant re-adjustment with respect to property rights, it is no less true that there must be a change in the thinking of most wives with respect to maintenance for themselves—particularly after a divorce where there are no children involved, or where the children are not in need of constant care. Property and maintenance questions, under a discretionary property system, are not subject to the present artificial distinction drawn between the rigidities of the law of separate property and the reasonable flexibility found under the *Divorce Act* concept of maintenance. Historically, this combination of rigid property rules and flexible maintenance concepts had led to divorce maintenance awards being used to a large extent to compensate a former wife for the inequalities inherent in the law of separate property. We are of the view that the ideal of equalization of property would be the best legislative policy and, subject to what we say in the following paragraphs, that it would be appropriate for such a policy to be stated in a new law providing for any sort of property-sharing system.

Equalization of property, however, presupposes a complementary reform of a rather fundamental nature respecting the rationale of interspousal maintenance, both during marriage and following a divorce. Until this has been accomplished, a discretionary property system, with its inherent flexibility, would seem to have some advantages not possessed by a community property or deferred sharing regime, at least in a jurisdiction where family property law reform preceded the reform of maintenance obligations. Although we do not wish to anticipate matters that we shall deal with in detail in the future, our present view is that the law should move in the parallel directions of equalization of property on divorce and, subject to the special requirements of individual cases, away from a concept of maintenance that is based as much upon the sex of the maintained spouse as it is upon needs flowing from the division of functions in the marriage.

As was pointed out by the English Appellate Court, the idea of the wife going her own way after a half-and-half property division is something that "may come in the future". We are concerned, however, with the present, and recognize that a transition period would probably be necessary between the present situation, where there is no property sharing and relatively large post-divorce maintenance awards for women, and some future situation of equal property sharing with post-divorce maintenance for a non-earning spouse eliminated in some cases, and reduced in others. Of the three regimes considered in this working paper, a discretionary property system appears to afford the most con-

venient way to accommodate the legitimate expectations, needs and interests of people who may be divorced during such a transition period. On the other hand, where the disadvantages of a discretionary system are thought to outweigh its advantages, causing a jurisdiction to choose a family property regime emphasizing fixed rights, it would nevertheless be possible to provide an element of discretion in the court at the time of divorce specifically to deal with the problems inherent in the relationship between the sharing of property and the maintenance of one former spouse by the other. As we have indicated, however, we think the necessity for such dispositions will be less and less felt as women achieve a greater measure of socio-economic equality. In any event, the goal must remain a law providing for full equalization of property at the time of divorce coupled with maintenance laws from which inequalities based upon sex have been eliminated.

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Some Other Considerations

The Continuing Importance of Maintenance

Although the advent of property sharing will have a direct effect upon maintenance on divorce, such sharing does not mean that property distribution will replace maintenance. Most families will accumulate relatively modest amounts of property during marriage, and in any event there will be no necessary connection between the amount of property available for sharing and the amount necessary to meet the reasonable needs of a spouse who will require periodic sums for his or her maintenance after divorce. Such needs will obviously be different for a person who has property at the end of a marriage as opposed to a person who has none, but they will not necessarily cease to exist merely because there has been a sharing of property. The property position of a spouse seeking maintenance in divorce proceedings will simply be another factor to be considered by the court in deciding whether a maintenance award would be appropriate, and if so, how much and for how long.

The Overall Goal of Family Law Reform

We should also point out that property sharing—particularly from the federal perspective, which is focused on the time of divorce—is a solution to only one of several important legal problems that affect the institution of matrimony. Property sharing means that the advantages and disadvantages that flow from a person's role within a marriage will be, with respect to the economic gains of the marriage, substantially equal for both spouses. In addition, however, we view it as an appropriate goal of law reform to remove from the law of separate property all sexually-based legal impediments to personal growth and full participation in the family as well as in the economic life of the community and to create equal legal responsibilities and opportunities for all married persons, from the day of marriage until its termination by death or divorce. Where these inequalities exist as a result of the state of the law, the law can and should be changed.

We see this goal of reform of family law as an increase in the spectrum of choice available to married persons of either sex with a consequent growth in individual freedom. The need to provide care for

children, for the family to have an income, and for household management will all remain fixed requirements for the ordinary Canadian family. The reform of private law cannot affect these matters. What it can do, however, is to ensure that husbands and wives are free to allocate these duties in accordance with their individual preferences and are required to discharge the legal responsibilities associated with these duties in accordance with their means and abilities, without being subjected to legally enforced sexual stereotyping, and without being penalized by law regardless of how these functions are divided between themselves.

Conclusions

Equality Before the Law for Married Persons

The traditional law of separate property that is applied in most jurisdictions in Canada at the time of divorce to define the property positions of spouses when a marriage is terminated is in immediate need of substantial change. Although our primary concern is with the application of the federal divorce law to persons whose property relations are governed by provincial property laws, our study of this subject has convinced us that reform of the law solely in relation to divorce would fall far short of what is required in order to ensure that justice is no longer denied to people upon entry into the legal relationship of matrimony.

Equality before the law must be the foremost goal of reform in this area.

Marriage almost invariably creates a differentiation in functions between the partners. Application to a family unit of the ordinary property laws that exist in a separate property jurisdiction fails to recognize this fact. The result is not only economic inequality but also a denial of the legal dignity and worth of the spouse who raises the children and works in the home rather than taking outside employment.

We take the position that there must be laws assuring each spouse, regardless of the division of functions during the marriage, a right to an equal participation in the financial gains of that marriage when it is terminated. This is, however, only a partial solution to a much wider problem. The whole law of separate property is characterized by invidious discrimination against spouses of both sexes, not only in particular rules of property law, but also in a discriminatory tradition of conventions, interpretations, and assumptions having the force of law. Some of these matters affect married men, but most are aimed at married women. Not all of these deal with property in a narrow sense, but most relate to the financial relations between married persons or the financial obligations or disabilities of one spouse or the other in relation to third parties, and therefore exert an influence upon the property patterns that develop during a marriage. Regardless of which sex is the target of any particular discriminatory law or practice, however, it is common humanity that suffers. The true question is not, therefore, whether there should be property sharing between married persons, but

rather whether there should be legal equality between married persons—a concept of which property sharing is only one important part. Our answer to this question is an unqualified “yes”. Property sharing must be, and must be seen to be, a logical aspect of a whole system of laws affecting married persons based upon equality rather than being the ultimate inconsistency capping the pyramid of contradictory, irrational and discriminatory rules and concepts that comprise the present law of separate property. If laws must be made to redress an imbalance between husbands and wives—and we see this as a necessary function of laws conducing to equality within the marital relationship—then those laws must be based upon the functions and duties that each spouse actually performed within the marital framework rather than upon legislative or judicial assumptions grounded in stereotypes dictating sexual roles.

It is true to say that the present law of separate property operating in the majority of Canadian jurisdictions, with its emphasis on ownership based upon who paid for the property, denies to most married women the ability to share in the financial gains of a marriage. It is no less true that the same law, with its requirements that husbands work, denies to married men the ability to fully participate in the care, instruction and upbringing of children, or to assume the more mundane, but no less important tasks associated with the management of a household. We believe the loss experienced by spouses of both sexes under the requirements of such a legal framework, while not identical, is certainly equivalent. Much has been said about the necessity to provide opportunities for careers outside the home for those married women who wish to realize their individual potential in such a way. We think that as much can be said for affording equivalent opportunities within the home for married men.

It is obvious that alterations in the present law will not result in any dramatic change in social patterns in this respect. What legal changes can and will do is to give to married people greater freedom of choice in these matters, so that they can decide for themselves how they should arrange their marriage partnership in a way that is based upon their abilities, their financial and psychological needs and their emotional interests. This choice should be capable of being made in a milieu that is free from legally based economic coercion, such as hiring practices that discriminate against married women in favour of married men on the grounds that they have a family that they alone are required to support; which deny to married women the ability to participate fully in the economic life of the community by legal restrictions upon their ability to borrow money and otherwise to employ the credit system; or that make it apparently logical that the husband should always be

the wage-earner because he, for no other reason than the fact that he is a male, can command a higher salary and will enjoy better career prospects than his wife.

We strongly disagree with the view that the law, rather than the autonomous choice of the married couple, should be responsible for telling spouses, on the basis of their sex, what they are destined to do when they are married, or whether they must be dependants, and, following from this, should attach unequal and discriminatory legal and financial consequences to the differing roles. We do not think it is possible for there to be a rational dialogue on the subject of property sharing without an examination of these more fundamental issues that are the inarticulate assumptions behind the present law of separate property. Property sharing is not an isolated improvement desirable for its own sake. Rather it is only one step on the road to equality before the law for married persons of either sex.

An Example of Change

We do not propose in this working paper, to suggest that any one of the three major approaches to property sharing would be more appropriate for adoption in any particular jurisdiction in Canada. Nor are the three approaches true alternatives, in the sense that they are mutually inclusive—it would be more accurate to say that they are examples of the three major directions in which reform has travelled in various jurisdictions that have sought some system that would be fairer than the unvarnished law of separate property. Further, the three approaches are capable of great modification, variation and combination. As an example, a province or territory could give its courts a discretion to transfer property between husband and wife at the time of divorce. The same jurisdiction could then create either a deferred sharing or a community property regime that would apply, as the basic law, to all persons who were married after the new regime came into effect. Persons married after that date could be given the power to opt out of the deferred sharing or community regime and into the separate-property-plus-discretion regime. Persons married before that date could have the option of changing to the deferred sharing or community property regime. In addition, such a province or territory could create a special community property system that would apply in every case to all married persons but which affected only the matrimonial home, and which provided that it would be co-owned, with joint rights of occupation, management and disposition, regardless of which regime applied to the other property of the married couple. We do not say that this would be an ideal property pattern for a Canadian jurisdiction to adopt,

but only that any of the approaches we have described in this working paper, or some combination of them, would be a significant improvement over the traditional law of separate property.

Tax Considerations

Any major redistribution of property rights and financial obligations within the family structure will inevitably have significant tax implications. Exactly what these may be will obviously vary according to the nature of the reforms. While we anticipate that many of the reforms discussed in this working paper would not be effected at the federal level, it will, in any event, be incumbent upon Parliament to insure that the tax burdens on an individual are no greater following a change of property and financial laws between married persons than they are now, as well as to ensure that, where any significant shift in rights or duties occurs from one spouse to another, the applicable tax burdens are reallocated accordingly. There is a further obligation upon Parliament, flowing from the nature and concept of federalism itself, to lend encouragement to the development of changes in the law of separate property within any given province or territory by providing positive support to such changes through amendments to the taxation laws and other laws dealing with family financial arrangements, whether or not those changes happen to coincide with Parliament's views of the ideal legal relationship between husbands and wives. The same requirement, we should add, also rests upon various federal departments, so that matters of administration and policy assist, rather than hinder the movement towards legal equality within marriage in Canada.

A Restatement of Principles

As a minimum, property sharing should be available at the time of a divorce. There is much to be said, however, for not restricting property sharing to divorce proceedings, and not making reform of marital property law a divorce-oriented change. We urge a broad approach to these questions.

The object of property sharing should be an equal participation by both spouses in the financial gains of the marriage, regardless of the internal division of functions in the marriage—that is, who worked outside the home, who managed the household and who cared for children—before the sharing took place. We do not favour equalization of property in isolation, however, and believe that complementary reforms should be implemented creating equality of obligation with respect to

interspousal maintenance and maintenance of children. This is an aspect of the law to which we will return in a subsequent working paper.

We do not think that moral or marital misconduct should be a consideration when property sharing takes place.

Some property, at least under a fixed-rights approach, should be exempted from sharing, such as property owned before marriage or property acquired by gift or inheritance from third parties during marriage. We believe, however, that income from and capital gains to non-sharable property should be shared. We do not believe that business or professional assets should be exempted from sharing.

We favour full retroactive application of any law giving a court discretionary powers with respect to property sharing at the time of a divorce. We also favour retroactive application of any deferred sharing or community regime unless persons who are already married make a positive choice to retain separate property.

Finally, as an integral part of any reform of family property laws, we favour the elimination from the law of separate property of all laws that either create or result in invidious discrimination against a married person based upon sex. Marriage should be a partnership between persons who are legal equals. It is within the power of the people of Canada, acting through their elected representatives, to ensure that this ideal is realized. In our view, nothing short of this goal should be sought and no law short of this goal should be tolerated.

The injustices sustained under the present family property regimes are problems that affect every married person in Canada. The Law Reform Commission of Canada has a public responsibility to inform Canadians of the present unsatisfactory state of family law and to formulate proposals for reform.

This book includes two major studies dealing with the law regulating the property rights and obligations of family members.

One constitutes a definitive analytical study of the several regimes operating in the Province of Québec. The other study is, in contrast, only partially analytical in content. The writers concentrated their attention on summarizing the injustices and inequities arising under the doctrine of separation of property operating in the common law jurisdictions.

In addition, the book includes the full text of the Commission's Working Paper on Family Property, setting out proposals for reform.

